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IN THE

Supreme Court of the United States

October Term, 1936

No. 178 - 183

IN THE MATTER OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Debtor.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, Etc., Et Al., Petitioners,
vs.
J. HAMILTON CHEETON, Et Al., Etc., Respondents. No. 3088

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, Etc., Et Al., Petitioners,
vs.
METROPOLITAN LIFE INSURANCE COMPANY, Respondents. No. 3089

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, Etc., Et Al., Petitioners,
vs.
CENTRAL HANOVER BANK AND TRUST COMPANY, Et Al., as Trustees, Etc., Respondents. No. 3090

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, Etc., Et Al., Petitioners,
vs.
THE NATIONAL CITY BANK OF NEW YORK, as Trustee, Etc., Respondents. No. 3091

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, Etc., Et Al., Petitioners,
vs.
JOHN C. TRAFFAGEN, Et Al., Etc., Respondents. No. 3092

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, Etc., Et Al., Petitioners,
vs.
JAMES G. BLAINE, Et Al., Etc., Respondents. No. 3093

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

CARTER H. HARRISON, Jr., et al.,
as the Protective Committee for The Chicago, Rock Island and Pacific Railway Company 7% and 6% Preferred Stock.

By LOY N. McINTOSH, Their Attorney
135 South LaSalle Street
Chicago, Illinois

McGOVERN AND HENDERSON, INC., CHICAGO

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IN THE

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October Term, 1946

No.....

IN THE MATTER OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, *Debtor.*

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, Etc., Et Al., *Petitioners,*
vs.
J. HAMILTON CHESTON, Et Al., Etc., *Respondents.*
No. 9203

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, Etc., Et Al., *Petitioners,*
vs.
METROPOLITAN LIFE INSURANCE COMPANY, *Respondent.*
No. 9204

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, Etc., Et Al., *Petitioners,*
vs.
CENTRAL HANOVER BANK AND TRUST COMPANY, Et Al., as Trustees, Etc., *Respondents.*
No. 9205

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, Etc., Et Al., *Petitioners,*
vs.
THE NATIONAL CITY BANK OF NEW YORK, as Trustee, Etc., *Respondent.*
No. 9206

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, Etc., Et Al., *Petitioners,*
vs.
JOHN C. TRAPHAGEN, Et Al., Etc., *Respondents.*
No. 9207

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, Etc., Et Al., *Petitioners,*
vs.
JAMES G. BLAINE Et Al., Etc., *Respondents.*
No. 9208

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Carter H. Harrison, Jr., Stephen V. R. Crosby, Charles F. Grey and George E. Pike, as the Protective Committee for The Chicago, Rock Island and Pacific Railway Company 7% and 6% Preferred Stock,

respectfully pray that a writ of Certiorari issue to review the order and judgment of the United States Circuit Court of Appeals for the Seventh Circuit (R. 332) which was entered on the 21st day of February, A. D. 1947, and in connection with which order and judgment petitioners filed their petition for rehearing, which petition, by order of said Court was, on the 7th day of April, A. D. 1947, denied (R.354), and which order and judgment was as follows:

> "The order of the District Court refusing to confirm the plan and referring the proceedings to the Interstate Commerce Commission is vacated, and the case is remanded to the District Court with instructions to confirm the plan."

OPINIONS BELOW.

The opinion and order of the United States District Court for the Northern District of Illinois, Eastern Division (R. 249-254), was filed June 28, 1946. It has not been reported. The opinion and order of the United States Circuit Court of Appeals for the Seventh Circuit (R. 332) was filed on February 21, 1947, petition for rehearing was denied on April 7, 1947 (R. 354) and is reported in Fed. 160(2d) 942.

JURISDICTION.

Jurisdiction to issue the Writ requested is found in the provisions of Section 24(c) of the Bankruptcy Act and Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C.A., Sec. 347(a)).

STATUTES INVOLVED.

The pertinent provisions of the Bankruptcy Act, as amended, as follows:

Sub-Section (f), Section 77:

> "Upon *confirmation* by the judge, the provisions of the plan and of the order of confirmation shall, *subject to the right of judicial review,* be binding * * * ."

Sub-Section (e), Section 77:

"* * * If the judge shall *not confirm* the plan, he shall file an opinion, with a statement of his conclusions and his reasons therefor and enter an order in which he shall either dismiss the proceedings or, *in his discretion*, and on motion of any party in interest, refer the case back to the Commission for further proceedings, including the consideration of modifications of the plan or the proposal of new plans. * * *" (Italics Supplied)

STATEMENT.

The Chicago, Rock Island and Pacific Railway Company, principal debtor, a railroad corporation, on June 7, 1933, filed its petition in the District Court of the United States for the Northern District of Illinois, Eastern Division, stating that it was unable to meet its debts as they matured, and that it desired to effect a plan of reorganization under Section 77 of the Act of July 1, 1898, entitled, "An Act to Establish a Uniform System of Bankruptcy Throughout the United States," as amended. The District Court, on June 7, 1933, approved the petition as properly filed, and authorized the debtor to continue in possession and control of its properties and assets. Thereafter certain railroad corporation subsidiaries of the principal debtor filed similar petitions in the same proceedings. Each of said petitions stated that the respective petitioner desired to effect a plan of reorganization in connection with a plan of reorganization of the principal debtor. Said petitions were approved by the District Court as properly filed. On November 22, 1933, trustees of the assets of the several debtors, effective December 1, 1933, were appointed. Such appointment was made permanent by order entered December 28, 1933. The trustees first appointed took possession of the properties and assets of the several debtors on December 1, 1933, and

since that time they, or their respective successors in office, have continued in possession and control of the debtor's properties and the operation thereof.

Plans of reorganization were presented to the District Court and the Interstate Commerce Commission by the principal debtor on July 15, 1936, and by others on or about July 20, 1938. Hearings on said plans were held by the Interstate Commerce Commission beginning October 6, 1936, the final hearing being closed on July 7, 1938. The Commission issued its report and order on October 31, 1940, approving a plan of reorganization for the debtors, to which various petitions for modification were filed, and on July 31, 1941, the Commission issued its supplemental report and order wherein it modified the plan in certain respects. To eliminate certain errors and inconsistencies in the approved plan, the Commission issued a further supplemental report and order on October 21, 1941, and again on April 6, 1942. After hearings were had upon the said plan of reorganization, as modified, which hearings were concluded on October 17, 1941, the District Court, on June 31, 1943, filed its opinion approving the said plan except as to two matters. On June 25, 1943, the District Court entered an order referring the proceedings back to the Commission for further action in accordance with the applicable provisions of Section 77 of the Bankruptcy Act and the Court's opinion, and in addition for the Commission's determination in the first instance of certain matters decided in said Court order. The Commission, on September 1, 1943, held a hearing, and thereafter made its supplemental report and order dated January 23, 1944, approving a further modified plan of reorganization containing modifications in accordance with the order of the District Court referring the proceedings back to the Commission.

On June 15, 1945, the District Court entered its order approving the plan of reorganization, as modified by the Commission.

On June 20, 1946, the United States Circuit Court of Appeals for the Seventh Circuit entered its order and judgment affirming the order of the District Court which approved the plan of reorganization of the debtor.

On February 26, 1946, the Commission certified to the District Court that (a) 75.78% of the creditors of Class 14, holding $1,967,000.00 principal amount of the debtor's 4½% Gold Bonds, due May 1, 1960, voting on the plan had rejected the plan (R. 96); and (b) 80.62% of the creditors of Class 21-A, holding $119,000.00 principal amount of Little Rock and Hot Springs Western Railroad Company First Mortgage 4% bonds, due July 1, 1939, voting on the plan had rejected the plan (R. 98).

On June 11, 1946, in the exercise of the discretion which is vested solely in the District Court under sub-Section (e) of Section 77 of the Bankruptcy Act, the District Court, after due notice to all parties in interest, held a hearing to determine (i) whether or not the plan made adequate provision for fair and equitable treatment for the interests and claims of those rejecting it, (ii) whether or not such rejection was reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts, and (iii) whether or not the plan conformed to the requirements of clauses 1 to 3, inclusive, of the first paragraph of Sub-Section (e) of said Section 77 (R. 168-248). On June 28, 1946, the District Court filed its memorandum opinion and entered its order, namely:

> "(1) The plan of reorganization of the debtor approved by the Court in its order entered on June 15, 1945, be not confirmed, and (2) case be referred back to the Interstate Commerce Commission pursuant to

> sub-Section (e) of Section 77 of the Bankruptcy Act, as amended, for further proceedings in accordance with the applicable provisions of said Section 77 and in accordance with the opinion of the Court, including the question of modifications of the plan or the proposal of new plans" (R. 254-255).

By its order refusing to confirm the plan, the District Court, in the exercise of the discretion, *which is vested solely in it,* sustained the dissenting votes of the two classes of creditors and refused to invoke the so-called "cram down" provisions of Sub-Section (e) of Section 77 of the Bankruptcy Act (R. 249-255).

Six appeals were taken from the order of the District Court refusing to confirm the plan, being Cases 9203 to 9208, both inclusive, in the United States Circuit Court of Appeals for the Seventh Circuit.

On February 21, 1947 (petition for rehearing denied April 7, 1947), the United States Circuit Court of Appeals for the Seventh Circuit entered its judgment and order, namely:

> "The order of the District Court refusing to confirm the plan and referring the proceedings to the Interstate Commerce Commission is vacated, and the case is remanded to the District Court with instructions to confirm the plan." (R. 332) (160 Fed. (2d) 942.)

On May 6th, 1947, the United States Circuit Court of Appeals for the Seventh Circuit caused its mandate to be filed in the District Court in connection with the aforesaid order and judgment.

MOTION.

These petitioners respectfully pray that an order may be entered forthwith by this Court prohibiting the District Court of the United States for the Northern District of Illi-

nois, Eastern Division, until the further order of this Court, from following the mandate of the United States Circuit Court of Appeals for the Seventh Circuit, which directed the District Court to confirm the plan of reorganization of the debtor.

QUESTIONS PRESENTED.

A. The United States Circuit Court of Appeals for the Seventh Circuit decided for the first time in railroad reorganization proceedings under Section 77 of the Bankruptcy Act that *an appeal lies from an order* of the District Court *refusing to confirm* a plan of reorganization.—This is an important question of Federal law which has not been but which should be settled by the Supreme Court of the United States.

B. The United States Circuit Court of Appeals for the Seventh Circuit, in refusing to dismiss the appeal for want of jurisdiction, without assigning any reason therefor, has rendered a decision which is in direct conflict with its own decision in *Gilbert vs. Securities and Exchange Commission*, 146 Fed. (2d) 513 (Dec. 20, 1944), which held that no appellate jurisdiction existed because no final order had been entered by the District Court.

C. The United States Circuit Court of Appeals for the Seventh Circuit has rendered a decision in this case in conflict with the decision of the Second Circuit, *Knight, et al. vs. Wertheim & Co., et al.*, 158 Fed. (2d) 838. The Seventh Circuit held, in this case, that creditors of a railroad, *upon the refusal* of the District Court *to confirm a plan of reorganization, are aggrieved parties, and have an appealable interest*, whereas in the Second Circuit that Court held that creditors are not aggrieved parties upon the refusal of the District Judge to confirm a reorganization plan, and have no appealable interest.

D. (i) During the pendency before the Interstate Commerce Commission of a referred plan of reorganization of a debtor railroad by the District Judge, and (ii) before the Interstate Commerce Commission had reported back to the District Judge, the United States Circuit Court of Appeals, without the Interstate Commerce Commission being a party, took jurisdiction on an appeal and entered its judgment and order directing the District Judge to set aside his order refusing to confirm and of re-reference to the Interstate Commerce Commission, and to confirm the plan of reorganization, thereby invading the supreme, exclusive and plenary jurisdiction of the Interstate Commerce Commission to complete its investigation and to report back to the District Judge.

E. Since this is the *first case* which has been presented to this Court wherein (i) certain classes of creditors have rejected a plan of reorganization for a railroad, and (ii) the District Court, by reason of said rejection and chain of circumstances, (a) refused to exercise the so-called "cram down" provisions of Sub-Section (e), Section 77, and (b) referred the plan of reorganization back to the Interstate Commerce Commission for further consideration, it is essential, in the proper administration of the Bankruptcy Act, that this Court should settle:

1. The procedure to be followed by the District Judge subsequent to the approval of a plan by the District Judge.

2. The circumstances under which the District Judge must preemptorily exercise the so-called "cram down" provisions of Sub-Section (e), Section 77.

3. The limits of discretion, if any, which remain vested in the District Judge subsequent to the order of approval in cases where creditors, on vote, have refused to approve the plan of reorganization.

4. Whether an order of the District Court refusing to confirm a plan of reorganization is a final or appealable order.

5. Whether, when the District Judge has refused to confirm a plan of reorganization and refers the plan of reorganization back to the Interstate Commerce Commission, all courts have lost jurisdiction over such plan of reorganization of a debtor railroad until the Commission has again certified back to the District Judge a subsequent plan of reorganization.

6. What jurisdiction, if any, is vested in the United States Circuit Court of Appeals under Section 77 of the Bankruptcy Act, as amended, to allow an appeal from an order of the District Judge refusing to confirm a plan of reorganization.

7. Whether all orders and judgments of the Circuit Court of Appeals on an appeal from an order of the District Judge refusing to confirm the plan of reorganization, are *coram non judice*, null and void, and binding on no one, for the reason that the Circuit Court of Appeals is without jurisdiction on such an appeal.

8. Whether the Circuit Court of Appeals is empowered, without statutory jurisdiction, to enter an order, regardless, merely because of expediency.

9. Whether the Interstate Commerce Commission is a necessary party in the Circuit Court of Appeals when an appeal has been taken from an order refusing to confirm a plan of reorganization and the question of the plan of reorganization has been referred to the Interstate Commerce Commission by the District Judge.

10. Whether the Circuit Court of Appeals has in effect the power to confirm a plan of reorganization, notwithstanding an adverse vote of a class or classes of creditors, or whether this power alone, by Section 77 of the Bankruptcy Act, as amended, is vested solely in the District Judge.

11. Whether the Circuit Court of Appeals can mandamus the District Judge as to what sort of an opinion he shall file in connection with a hearing on the confirmation of a plan of reorganization of a railroad.

12. Whether the Circuit Court of Appeals can override the District Judge as to discretionary powers, which are vested solely in the District Judge under Sub-Section (e) of Section 77 of the Bankruptcy Act, as amended.

13. What weight, under Federal Rules of Civil Procedure, Rule 52, U.S.C.A., following Section 723(c), must the Circuit Court of Appeals give to the opinion and findings of the District Judge on a confirmation hearing.

14. Whether judicial acts involving the exercise of discretion, and which from their nature and circumstances are controlled by the personal judgment of the court, are final, and whether they can be set aside on appeal except where there is an abuse of power.

15. Whether the power to confirm a plan of reorganization under Sub-Section (e), Section 77 of the Bankruptcy Act, notwithstanding an adverse vote of a class or classes of creditors, is discretionary, or is mandatory. If it is discretionary, has the Circuit Court of Appeals any power to compel a District Judge to exercise a discretion in the manner dictated by the Circuit Court of Appeals, or is the District Judge alone empowered to exercise the discretionary power of confirmation or refusal to confirm?

(Note: In all previous cases decided by the courts of appeal, including this Court, relating to the reorganization of a railroad under Section 77 of the Bankruptcy Act, as amended, there did not exist the question of jurisdiction of the appellate courts, for the reason that (1) the Interstate Commerce Commission had lost its jurisdiction over the plan by having certified the plan to the District Judge, and (2) the District Judge had confirmed the plan of reorganization. [Sub-Section (f) of Section 77 of the Bank-

ruptcy Act, as amended, clearly provides for *appellate review of an order of confirmation* by the District Judge, by the following language: "(f) *Upon confirmation* by the judge the provisions of the plan and the order of confirmation shall, *subject to the right of judicial review, be binding* * * * ".]).

This is the first case in railroad reorganizations in which an appeal has been taken from an order of the District Judge refusing to confirm the plan and in which the Circuit Court of Appeals has ruled that it has jurisdiction of such appeal, substituted its discretion for that of the District Court, and ordered the District Court, regardless of the District Judge's opinion, to confirm the plan of reorganization, notwithstanding the provisions of Sub-Section (e), Section 77 of the Bankruptcy Act, as amended, which provides: "If the judge shall not confirm the plan he *shall* file an opinion with a statement of his conclusions and his reasons therefor and enter an order in which he *shall* either *dismiss* the proceedings or *in his discretion*, and on motion of any party in interest, *refer* the case back to the Commission for further proceedings, including the consideration of modifications of the plan or the proposal of new plans." (Italics supplied) This mandatory direction to the District Judge *contains no language authorizing an appeal* from an order entered by the District Judge *refusing to confirm* a plan of reorganization, as is found in Sub-Sec. (f), which authorizes an appeal from an order *confirming* a plan.

REASONS FOR GRANTING WRIT.

[Notwithstanding Rule 52, Federal Rules of Civil Procedure, and what this Court has said on many occasions, particularly in *Reconstruction Finance Corp.* v. *Denver & Rio Grande Western RR. Co.*, 328 U.S. 495, that in view of the District Judge's familiarity with the reorganization his findings has a special weight, nevertheless the Circuit Court of Appeals refused to give any weight to the District

Judge's familiarity with the reorganization of the Chicago, Rock Island, it substituted its own findings of fact, and it directed the District Judge to set aside his order refusing to confirm and to enter an order confirming the plan. The Circuit Court of Appeals refused to follow the well-established rule that where a question of fact is involved and where in deciding a question of fact the District Judge has exercised a discretionary power, such exercise of discretion will not be reversed by the appellate courts unless a gross abuse of discretion shown. There was no abuse of discretion shown by the record in this case, and the District Judge, in refusing to confirm the plan, did exercise his discretionary power under Section 77(e).]

I.

The United States Circuit Court of Appeals for the Seventh Circuit decided for the first time in railroad reorganizations under Section 77 of the Bankruptcy Act, as amended, (i) that an *appeal lies from an order* of the District Court *refusing to confirm* a plan of reorganization, (ii) that the Circuit Court of Appeals has the power to direct the District Judge to set aside his opinion and order refusing to confirm a plan of reorganization of a railroad, and (iii) that the Circuit Court of Appeals may, notwithstanding the discretionary power vested in the District Judge, direct the District Judge to enter an order confirming the plan of reorganization.

A. The opinion of the United States Circuit Court of Appeals for the Seventh Circuit shows upon its face a total want of jurisdiction of the subject matter in that it undertakes, while the case is pending before the Interstate Commerce Commission pursuant to a statutory, discretionary order of the District Court, to reverse by an order wholly *coram non judice.*

B. The opinion of the United States Circuit Court of Appeals for the Seventh Circuit undertakes to dispose of the pendency of the case before the Interstate Commerce

Commission on the quaint theory that such pendency is but one in many steps in the execution of a bankruptcy proceeding. Reference to *Group of Investors* v. *Chicago, Milw. & St. Paul RR. Co.*, 318 U.S. 523, shows that the discretionary power to refuse to confirm a plan of a debtor railroad is vested solely in the judge of the District Court, under the following language appearing in the third paragraph of Sub-Section (e) of Section 77 of the Bankruptcy Act, as amended, namely:

> " * * * provided that if the plan has not been so accepted by the creditors and stockholders, the Judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it, that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all relevant facts, and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this Subsection (e): * * * If the Judge shall not confirm the plan, he shall file an opinion, with a statement of his conclusions and his reasons therefor, and enter an order in which he shall either dismiss the proceedings, or in his discretion and on motion of any party in interest, refer the case back to the Commission for further proceedings, including the consideration of modifications of the plan or the proposal of new plans * * * ."

C. The United States Circuit Court of Appeals for the Seventh Circuit had no jurisdiction on the appeal (i) because of the fact that the case, by order of the District Court, was then pending before the Interstate Commerce Commission, and (ii) because of the fact that the District Judge had refused to confirm the plan. [There is no provision under Section 77 of the Bankruptcy Act authorizing a judicial review of such an order by a court of appellate jurisdiction, *but there is an express mandatory provision in Section 77 as to what disposition shall be made of a plan of reorganization when the District Judge shall refuse*

to confirm. That mandatory provision is found in sub-Section (e) of Section 77 of the Bankruptcy Act, as amended, as follows:

> " * * * If the Judge shall *not confirm* the plan, he shall file an opinion, with a statement of his conclusions and his reasons therefor, and *enter an order* in which he shall *either dismiss* the proceedings, *or* in his discretion and on motion of any party in interest, *refer the case back to the Commission* for further proceedings, including the consideration of modifications of the plan or the proposal of new plans. * * * "] (Italics ours.)

Nowhere in Section 77 proceedings is there any authority for the Circuit Court of Appeals to exercise appellate jurisdiction over an order of the District Judge refusing to confirm a plan of reorganization. If it was intended that there be such appellate jurisdiction, then the Congress would have inserted in the above quoted law a provision similar to that found in sub-Section (f) of Section 77 of the Bankruptcy Act, which reads: "(f) * * * *Upon confirmation* by the judge the provisions of the plan and of the order of confirmation shall, *subject to the right of judicial review,* be binding * * * :" (Italics ours.) Since the Circuit Court of Appeals had no jurisdiction of the subject matter of this cause, then its judgment and all other proceedings anterior and subsequent thereto are *coram non judice* and of no legal effect. Its judgment and order is a nullity, no one is bound to observe it, and, as the old legal saying goes, "it is a dead limb on the judicial tree."

The United States Circuit Courts of Appeal are courts of limited jurisdiction and no presumption of jurisdiction attaches to such courts. Jurisdiction must affirmatively appear from the record, and the record in this case clearly shows want of jurisdiction in the United States Circuit Court of Appeals of the subject matter. It was the duty of the United States Circuit Court of Appeals, as it is the

duty of this Court, to determine in the first instance whether or not jurisdiction existed in the United States Circuit Court of Appeals to allow the appeal from the order of the District Judge refusing to confirm the plan, and if it appears that jurisdiction is lacking, then it was the duty of the United States Circuit Court of Appeals to dismiss the appeal for want of jurisdiction. *Bors* v. *Preston*, (1888) 111 U.S. 252, 255; *Lion Mfg. Co.* v. *Chicago Flexible Shaft Co.* (7th Cir., 1939), 106 Fed. (2d) 930, 933; *Clark v. Paul Gray, Inc.* (1939), 306 U. S. 583; *Kvos, Inc.* v. *Associated Press* (1936), 299 U. S. 269; *Read* v. *Dickerson* (1941), 312 U.S. 656.

II.

The decision of the United States Circuit Court of Appeals for the Seventh Circuit is in direct conflict with its own decision in Gilbert v. Securities and Exchange Commission, 146 Fed. (2d) 513 (Dec. 20, 1944).

The arbitrary exercise of appellate power by the United States Circuit Court of Appeals for the Seventh Circuit in this case, without jurisdiction of the subject matter, is plainly contrary to the rule laid down by that Court in *Gilbert* v. *Securities and Exchange Commission,* and *Pike, et al.* v. *Same,* 146 Fed. (2d) 513 (1945, CCA 7th), wherein the same judges sat and concurred in that opinion as in this case. Without any reference to the *Gilbert* case which, while being a 77(B) proceeding in bankruptcy, was a precise analogue to a Section 77 proceeding, as to the point at issue, and the extensive reasoning therein set forth, the Circuit Court of Appeals saw fit to overrule and ignore its judgment in that case in exercising appellate power in this case, without assigning any reason therefor. The situation in the present case is even more acute than in the *Gilbert* case, *supra*, in that here the case was at the time the Circuit Court of Appeals exercised appellate jurisdiction, and now

is, actually pending before the Interstate Commerce Commission pursuant to a statutory, discretionary order entered by the District Judge on June 28, 1946, which order referred this case back to the Interstate Commerce Commission.

In any event, the reasoning of the Circuit Court of Appeals that the refusal to confirm the plan of reorganization and the reference back to the Interstate Commerce Commission for further proceedings could be ignored on the basis of a composite theory [*In re Chicago R. I. & P. Ry. Co., Cheston et al.* v. *Chase National Bank, et al.*, Nos. 9203-9208, 160 Fed. (2d) 942, p. 944: "Before we proceed to discuss the question involved we note that appellees have moved that the appeals be dismissed on the ground that the order refusing to confirm the plan adjudicated no rights of the parties. Section 24 (a) of the Chandler Act (11 U.S.C.A. Par. 47 (a)) gives the Circuit Courts of Appeal jurisdiction from courts of bankruptcy 'in proceedings in bankruptcy, either interlocutory or final * * * '. We agree with appellants that the development, approval, confirmation and consummation of a plan of reorganization are not mere steps of an ordinary lawsuit, and whether we consider the order interlocutory or final, the fact remains that the order was one of substance, entered in a proceeding in bankruptcy which this court has power to dispose of on the merits; hence the motion must be and it is, denied."] does violence to the statutory provision that after a reference back, of a plan of reorganization of a debtor railroad to the Commission, a condition precedent to the further exercise of judicial power by the courts over reorganization plans is specifically controlled by Section 77 of the Bankruptcy Act, as amended: "(d) * * * No plan shall be approved or confirmed by the judge in any proceeding under this section unless the plan shall first have been approved by the Commission and is certified to the court * * * (e) Upon the certification of a

plan by the Commission to the court the court shall * * * " (Title 11, U.S.C.A., Sec. 205(e)). Not until the Interstate Commerce Commission, after a reference back to it, exhausts its administrative or exclusive, executive jurisdiction over plans of railroad reorganization and certifies to the judge the results of such submission is there any semblance of a justiciable controversy in so far as a reorganization plan of a debtor railroad is concerned. Upon the entry on June 28, 1946 of the order of the District Judge [(a) refusing to confirm the plan of reorganization of the debtor, and (b) referring the case back to the Interstate Commerce Commission pursuant to Sub-Section (e) of Section 77 of the Bankruptcy Act, as amended] the courts (original and Appellate) lost completely all jurisdiction over plans of reorganization of the Rock Island railroad, together with all power to do anything with reference to a reorganization plan of the railroad, until, pursuant to the provisions of said Sub-Sections (d) and (e), the Interstate Commerce Commission had again certified a plan of reorganization of the debtor railroad back to the District Judge. On June 28, 1946, the date on which the District Judge refused to confirm the plan of reorganization and referred the case back to the Commission, there was not and there is not now in existence any plan of reorganization of the Rock Island railroad under Section 77 of the Bankruptcy Act, as amended. The order of the District Judge refusing to confirm the plan of reorganization adjudicated no rights of the parties. By that order creditors remain creditors and stockholders remain stockholders of the debtor railroad. Creditors have their claims and that is all they have. Stockholders have their shares of stock and that is all they have, in so far as said order refusing to confirm is concerned. The order refusing to confirm was not a final order. The respective rights of the parties do not and cannot be fixed in a railroad reorganization proceeding until an order has been entered confirming a plan

of reorganization. Until an order confirming a plan is entered there is no appealable order as to a plan of reorganization. This rule was recognized by the Circuit Court of Appeals for the Seventh Circuit in *Gilbert* v. *Securities and Exchange Commission*, 146 Fed. (2d) 513 (1944), and in departing from the settled law in the Seventh Circuit in the *Gilbert* case, the Circuit Court of Appeals arbitrarily invaded the supreme, exclusive and plenary jurisdiction of the Interstate Commerce Commission, as well as the statutory, discretionary power of the District Judge. The assumption of jurisdiction by the Circuit Court in this case, and its judgment entered February 21, 1947, remanding the case to the District Court with instructions to confirm the plan, could well be termed a "judicial monstrosity" (*Gilbert* v. *Securities and Exchange Commission*, 146 Fed. (2d) 513). It is definite that under Section 77 (e) of the Bankruptcy Act, as amended (Title 11, U.S.C.A., Sec. 205 (e)), *there is vested in the District Judge solely*, and not in the Circuit Court of Appeals, nor in the Federal Appellate system, power to confirm or to refuse to confirm a plan of reorganization of a railroad. The District Court *is bound*, under Sub-Section (e) of Section 77 of the Bankruptcy Act, as amended, to make its own independent determination as to whether a plan of reorganization, after it has been rejected by a class of creditors: (1) makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it; (2) that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and (3) that the plan conforms to the requirements of clauses 1 to 3, both inclusive, of the first paragraph of said Sub-Section (e). Since the District Court is so bound to make its own independent determination, the Circuit Court of Appeals, by its opinion in this case, usurped the power vested solely in the District Court and trespassed upon the sovereign power of the Interstate

Commerce Commission within its statutory scope (*Gilbert* case, *supra*). This being true, the review by the Circuit Court of Appeals for the Seventh Circuit was not only an idle and useless gesture, but seriously interfered with the orderly procedure contemplated in the reorganization of a railroad under Section 77 of the Bankruptcy Act, as amended (*Gilbert* case, *supra*). Congress did not, in Section 77 proceedings, provide for a review by any court having appellate jurisdiction of a *discretionary order authorized to be entered solely by the District Judge* as a condition precedent to the further exercise of a statutory, judicial power (*Gilbert* case, *supra*).

Without any record showing whatsoever that the appellants were aggrieved by the order of the District Judge refusing to confirm the plan of reorganization, and by the pendency of the Rock Island reorganization before the Interstate Commerce Commission, the opinion and judgment of the Circuit Court of Appeals for the Seventh Circuit in this case arbitrarily reversed the District Judge on the motion of appellants, who were not aggrieved parties. Nowhere in the opinion does it appear how or why or wherein the appellants, or any of them, were aggrieved by the order appealed from. The order of the District Judge in refusing to confirm the plan and referring it back to the Commission in no way diminished the rights of appellants. It did not increase their burdens. It did not detrimentally affect any of their rights. Creditors remained creditors and stockholders remained stockholders by the order refusing to confirm. All the order did was to refer to the Commission the entire question of the plan of reorganization for the Rock Island railroad. The order refusing to confirm took nothing from appellants, or any other party. In *Gilbert* v. *Securities and Exchange Commission*, 146 Fed. (2d) 513, the Circuit Court of Appeals for the Seventh Circuit, by Circuit Judge Major, said, at page 514:

> "Generally accepted is the legal tenet that no one may appeal from a judgment unless he has an interest therein direct, immediate, pecuniary and substantial. Speaking more specifically, a party has an appealable interest only when his property may be diminished, his burdens increased, or his rights detrimentally affected by the order sought to be reviewed. Applying the rationale thus stated, it seems rather plain that the orders complained of do not diminish petitioners' property, increase their burdens or detrimentally affect their rights.
>
> "This Court, *In re Michigan-Ohio Building Corp.*, 117 Fed. (2d) 191, on its own motion dismissed an appeal holding that appellants were not aggrieved and therefore had no appealable interest. In so doing we stated, at page 192 of 117 Fed. (2d): 'We are faced at the outset with the question obtruding from the face of the record as to whether appellants have such an interest or are to such degree aggrieved as to create in them the power of appeal.'"

No party has a vested right in a plan of reorganization of a railroad until an order of confirmation has been entered. Until an order of confirmation is entered the provisions of a plan of reorganization of a debtor railroad are binding upon no one. Any plan of reorganization, until confirmed, may be changed (the Rock Island plan was changed by order of the Commission on no less than four occasions). This is clearly supported by Sub-Section (f) of Section 77 of the Bankruptcy Act, as amended (Title 11, U.S.C.A., Sec. 205 (f)):

> "Upon the *confirmation* by the Judge the provisions of the plan and of the order of confirmation shall, subject to the right of judicial review, *be binding* upon the debtor, all stockholders thereof, including those who have not as well as those who have accepted it, and all creditors, secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it." (Italics ours.)

(Note: Sub-Section (f) is the only provision authorizing judicial review of a Section 77 reorganization plan. *No judicial review is authorized except upon confirmation of a plan of reorganization.*) There is no authority in Section 77 or elsewhere for judicial review of an order of the District Court refusing to confirm a plan of reorganization. The Circuit Court of Appeals for the Seventh Circuit not only had no statutory jurisdiction on an appeal from the order of the District Judge refusing to confirm a plan of reorganization, but that Court, without assigning any reason therefor, reversed the position which it took in 1945 in the *Gilbert* case, *supra*.

III.

The United States Circuit Court of Appeals for the Seventh Circuit in this case rendered a decision in conflict with the decision of the Second Circuit, Knight, et al. v. Wertheim & Co., et al., 158 Fed. (2d) 838 (Dec. 31, 1946).

The United States Circuit Court of Appeals for the Seventh Circuit in this case rendered a decision in conflict with the decision of the Second Circuit in *Knight, et al.* v. *Wertheim & Co., et al.*, 158 Fed. (2d) 838, the Seventh Circuit holding in this case that creditors, upon the entry of an order by the District Judge refusing to confirm a plan of reorganization, are aggrieved parties and have an appealable interest, whereas the Second Circuit held that upon the refusal of the District Judge to confirm a plan of reorganization, creditors are not aggrieved parties and have no appealable interest. The proceedings in the Second Circuit were under Section 77(B), but that proceeding is an analogue to proceedings under Section 77.

IV.

Rule 52 ignored by Circuit Court.

Without waiver of the jurisidictional question hereinbefore raised, further reasons for granting the Writ exist:

A. Judicial actions which involve "discretion" and which from their nature and circumstances are controlled by the personal judgment of the court are final and cannot be set aside on appeal except where there is an abuse of power. The District Judge, under Sub-Section (e) of Section 77 of the Bankruptcy Act, as amended, in ascertaining whether or not (a) the plan made adequate provision for fair and equitable treatment for the interests or claims of those rejecting it, and (b) that such rejection was or was not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts, was not engaged in ascertaining indisputable facts. The District Judge was forming a judicial judgment, and largely a prophetic judgment regarding a maze of facts, as to each of which factors there was and is a basis for considerable difference of opinion. The District Judge, in reaching a conclusion that the plan should not be confirmed, exercised a discretion vested in him and him alone by Sub-Section (e), which was the power to determine questions to which no strict rule of law is applicable but which from their very nature and circumstances have to be controlled by the personal judgment of the court. The mere fact that the decision reached by the District Judge in refusing to confirm the plan differed from what might be alleged to be a reasonable viewpoint of appellants, who naturally were disappointed at the finding of the court, convinces no one that the discretion which was exercised by the court was abused. Discretion is abused when the judicial action is arbitrary, fanciful or unreasonable, which means that if reasonable men could differ as to the propriety of the action taken by

the trial court, then it cannot be said that the trial court abused its discretion. The holders of 75.78% of the total claims allowed as Class 14, and the holders of 80.62% of claims allowed as Class 21-A, *who we must assume were reasonable men,* rejected the plan of reorganization and thus differed in their opinion as to the fairness of the plan from the class of creditors who voted in favor of the plan. The District Judge, in refusing to confirm the plan, determined the fact that the creditors rejecting the plan were reasonably justified in so doing. The District Judge thus determined a question of fact to which no strict rule of law applies, but which from its nature and circumstances had to be controlled by the personal judgment of the court. The determination of this fact was one upon which reasonable men could differ. That being the case, and there being nothing in the record which in any way indicates that the exercise of this discretionary power on the part of the District Judge was arbitrary, fanciful or unreasonable, then the judgment of the District Judge in refusing to confirm the plan is final and cannot be set aside on appeal. (*In re Paloma Estates, Inc.,* 126 Fed. (2d) 72 (Certiorari denied 317 U.S. 684) (1942); *Kelso* v. *MacLaren,* 122 Fed. (2d) 867; *Delno* v. *Market Street Ry. Co., et al.,* 124 Fed. (2d) 965.)

The order of the District Judge refusing to confirm the plan of reorganization contained the following findings of fact (R. 254):

> "And the Court being satisfied and finding in the light of the additional evidence presented at said hearing on June 11, 1946, (a) that the plan does not make adequate provision for fair and equitable treatment for the interests or claims of the holders of the Convertible Bonds; (b) that the rejection of the plan by the hloders of the Convertible Bonds was reasonably justified in the light of the respective rights and interests of the holders of the Convertible Bonds and

> all the relevant facts; (c) that the plan does not conform to the requirements of clause (1) of the first paragraph of sub-Section (e) of Section 77 of the Bankruptcy Act, as amended, in respect to its treatment of the holders of the Convertible Bonds * * *."

The above findings were not indisputable facts, and they were findings upon which reasonable men could differ. Since an appeal was taken from those findings, there was unquestionably a dispute about such facts. These facts were determined by the Court in the exercise of a discretion vested solely in the District Judge under Sub-Section (e). There being a dispute with regard to the facts as to whether or not a plan of reorganization should be confirmed, the Circuit Court of Appeals in this case should have applied the same rule of law which it did in *In re A. Roth Company*, 125 Fed. (2d) 396. In that case the United States Circuit Court of Appeals for the Seventh Circuit said, page 398:

> "Determination of abuse of discretion involves the exercise by us of sound judgment upon the facts. If there is a controversy as to facts, and if the facts themselves largely define the wisdom of the discretion, review by the Appellate Court is seldom effective, and it should not be. The Appellate Court's review does not include trial court's discretion."

To the same effect are *Rules of Civil Procedure*. Rule 52(a) in part provides:

> "Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses."

It has been repeatedly held by the Federal Appellate courts that where a question of fact is involved and where, in deciding a question of fact, the District Judge exercised a

discretionary power, such exercise of discretion will not be reversed by the Appellate courts unless a gross abuse of discretion is shown. (*Bostian* v. *Levich,* 134 Fed. (2d) 284; *Hultzman* v. *Tevis,* 82 Fed. (2d) 940; *Williamson* v. *Williams,* 137 Fed. (2d) 298.)

In *Reconstruction Finance Corp.* v. *Denver & Rio Grande Western RR. Co.,* 328 U.S. 495, this Court said:

> "In view of the District Judge's familiarity with the reorganization, this finding has special weight with us. See Federal Rules of Civil Procedure, Rule 52, 28 U.S.C.A., following Section 723(c)."

And in *Institutional Investors* v. *Chicago, Milwaukee & St. Paul RR. Co.,* 318 U.S. 523, at page 564, this Court said:

> "We would have a different problem if the District Court had failed to perform the functions which Section 77(e) places upon it, but it cannot be said that there is any such failure here. The District Court satisfied itself that the principles of priority as applied to these facts were respected * * * . Since such a determination rests in the realm of judgment rather than mathematics, there is an area for disagreement, but we are not performing the functions of the District Court under Section 77(e). Our role on review is a limited one. It is not enough to reverse the District Court that we might have appraised the facts somewhat differently. If there is a warrant for the action of the District Court our task on review is at an end."

It is shown by the record, as we will point out hereinafter, that there was warrant for the action of the District Court when it refused to confirm the plan. That being the case, the United States Circuit Court of Appeals for the Seventh Circuit had no power to reverse the District Judge as to his findings of fact.

V.

Distinction from the Denver Case.

The United States Circuit Court of Appeals for the Seventh Circuit held in this case, 160 Fed. (2d) 945 (R. 336):

> "Under this statute, a rejection would not be reasonably justified unless the rejectors have a valid reason for rejecting the plan. If there is a rejection the Court will re-examine the plan, but if the plan is found to be fair and equitable to the dissenters they cannot use the elements making the plan fair and equitable as the basis of their rejection *(Reconstruction Finance Corp.* v. *Denver & Rio Grande Western RR. Co.*, 328 U.S. 495). Thus it is clear that the court's discretion is not unlimited, but is circumscribed and until the statute is satisfied no discretion is vested in the court."

The Circuit Court overlooked the fact that there were two important distinctions between this case and the *Denver* case. First, in this case the District Judge had refused to confirm the plan, whereas in the *Denver* case the District Judge had confirmed the plan. Second, in this case in refusing to confirm the plan the District Judge reached his decision in the light of additional evidence presented at the hearing on June 11, 1946 (R. 254), whereas the *Denver* decision was not based on additional evidence. The additional evidence which was before the Court at the hearing on the question of confirmation, and which showed "reasons to make their rejection reasonable may arise hereafter; for example, unanticipated large earnings might develop," (*Denver* case, *supra*) are as follows:

1. The order of the Interstate Commerce Commission dated December 6, 1946, increasing freight rates for railroads on an average of 17.6% and making permanent the 10% increase of passenger fares.

2. The major change in the nation's economy in the rate of interest for borrowed money.

3. Two classes of creditors entitled to vote, one by 75.78% and the other by 80.62% of those voting, have rejected the plan.

4. The improvement in asset position of the debtor since May 1, 1944 (R. 177-185, 193).

a. Net increase in investment in transportation property, May 1, 1944-April 30, 1946 (after normal depreciation but before amortization of defense projects)	$ 15,387,895.00
b. Increase in investment in affiliated companies in 1945	1,017,260.43
c. Cash on hand June 1, 1946, allocated to debt reduction	1,142,000.00
d. Cash on hand June 1, 1946, allocated to 1946 additions and improvements	12,313,130.00
e. Unallocated cash on hand June 1, 1946	10,997,108.00
f. New securities released to treasury by payment of Reconstruction Finance Corporation	28,169,202.00
g. Miscellaneous assets returned to treasury by payment of Reconstruction Finance Corporation	911,506.71
Total	$ 69,938,103.02

(The above statement of improvement in asset position is based upon the testimony of the Chief Clerk to the General Auditor of the Trustees of the debtor before the trial court on June 11, 1946 (R. 177-193)).

h. The decrease of the debts in the hands of the public between January 1, 1940 and April 30, 1946, $25,411,598.97. (R. 196)

i. (R. 198) The total amount of cash or cash equivalent as of March 31, 1946, the date last reported to the Interstate Commerce Commission, $82,272,199.08.

j. (R. 199) The net capital expenditures for the period January 1, 1940, to April 30, 1946, in the sum of $37,246,965.49.

k. (R 207) The earnings of the Rock Island in 1945 were 3.15 times the interest on all of the old indebtedness, including the Convertible 4½% and Little Rock Bonds, which voted against the plan, and as to 1944 the earnings were 5.27 times the total interest including those securities.

l. (R. 209) For the period January 1, 1941, to June 30, 1945, the average earnings of the corporation were sufficient to pay all interest on old indebtedness 3.85 times; for that period of four and one-half years the earnings on the old Preferred Stock were $121.49 per share and the earnings on the old Common Stock were $67.52 per share.

(R. 210) If the debtor had paid all of the interest in the period referred to above on all of its old indebtedness it would, as of December 31, 1944, have had available an excess over that requirement of interest of $34,000,000.00 for reduction of the bonded debt, additions, improvements, etc. Bring those figures down to date to the end of April, 1946, the amount which would have been available above and beyond all of the requirements for bank interest on all of the indebtedness would still have a surplus of $42,934,096.00 available for other corporate purposes such as improvements and retirement of debt. (Rec. 211) The 1944 earnings alone of the debtor before payment of excess profits taxes amounted to $53.50 on each share of the old Common Stock. (R. 212) During that year there was an excess profits tax of $40.62 per share on the old Common Stock, leaving a net of $12.88 which would have been available for the old Common Stock for that year. The excess profits tax is not any longer in existence. (The excess profits tax paid in 1944 was $30,207,438.00).

For the period January 1, 1941 to June 30, 1945, the debtor earned $71,291,766.00 which would have been allocable to the old stock of the corporation if reorganization had not been pending — The amounts charged by the Trustees from January 1, 1941, up to December 31, 1944, for additions and betterments, less the amount of new securities issued in payment therefor, were $63,149,267.00. (R. 212) In the year 1945 alone the sum of $14,420,968.00 was spent for additions and betterments.

m. On June 11, 1946, the date of the confirmation hearing, there was in existence further unanticipated reasons which had developed since the Commission and the Court approved the plan later rejected:

(1) The income tax rates, effective January 1, 1946, had been reduced in so far as corporations are concerned to a maximum of 38% of net earnings.

(2) Excess profits taxes were eliminated as of January 1, 1946.

(3) Capital stock taxes were eliminated as of January 1, 1946.

Beginning with January 1, 1946, excess profits taxes have been eliminated. In 1945 the debtor's excess profits tax was $30,207,438.00. (R. 212).

5. This Court will take judicial notice of its decision of December 16, 1946, *In the Matter of The Chicago, Rock Island and Pacific Railway Company,* on petition for writ of certiorari by the holders, or their representatives, of Choctaw, Oklahoma and Gulf Railroad Company First Mortgage and 5% Gold Bonds, which denied their claim for interest upon interest. This decision results in a savings of, to-wit, $500,000.00, for the debtor's estate, and increases by that figure the solvent position of the debtor. This decision is a development since the District Court refused to confirm the plan, but is a further justification for this Court to affirm the District Court.

It is therefore important that this Court determine whether a District Judge may exercise the discretion vested solely in him under Sub-Section (e) of Section 77 of the Bankruptcy Act, as amended, and refuse to enter an order confirming a plan of reorganization, or whether the District Judge can, by a writ of mandamus, be compelled by the United States Circuit Court of Appeals to confirm a plan of reorganization, regardless of the findings of controversial fact made by the District Judge at the time of his refusal to confirm the plan of reorganization.

CONCLUSION.

WHEREFORE, petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Seventh Circuit, directing that Court to certify and send to this Court for its review and determination on a day certain to be named therein a transcript of the record and the proceedings herein; that the judgment of said Circuit Court be reversed; and that your petitioners have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Dated at Chicago, Illinois, July 1, A. D. 1947.

Respectfully submitted,

CARTER H. HARRISON, JR., STEPHEN V. R. CROSBY, CHARLES F. GREY and GEORGE E. PIKE,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947
No. 178-183

In the Matter of THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, *Debtor.*	
THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, etc., et al., *Petitioners,* vs. J. HAMILTON CHESTON, et al., etc., *Respondents.*	No. 9203
THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, etc., et al., *Petitioners,* vs. METROPOLITAN LIFE INSURANCE COMPANY, *Respondent.*	No. 9204
THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, etc., et al., *Petitioners,* vs. CENTRAL HANOVER BANK AND TRUST COMPANY, et al., as Trustees, etc., *Respondents.*	No. 9205
THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, etc., et al., *Petitioners,* vs. THE NATIONAL CITY BANK OF NEW YORK, as Trustee, etc., *Respondent.*	No. 9206
THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, etc., et al., *Petitioners,* vs. JOHN C. TRAPHAGEN, et al., etc., *Respondents.*	No. 9207
THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, etc., et al., *Petitioners,* vs. JAMES G. BLAINE, et al., etc., *Respondents.*	No. 9208

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner is the Committee for the Preferred Stock of The Chicago, Rock Island and Pacific Railway

Company which seeks review of the decision of the Circuit Court of Appeals for the Seventh Circuit directing the United States District Court in Chicago to confirm the Section 77 reorganization plan heretofore approved. The contentions made by this petitioner parallel and overlap those made by the Debtor in its petition to this Court (No. 184-189) for a writ of certiorari to review the same decision of the Circuit Court of Appeals. In order to avoid duplication of briefs, the respondents have answered the contentions of the Debtor and of the Preferred Stock Committee in one brief submitted in opposition to the Debtor's petition. A copy of that brief is attached hereto.

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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August 8, 1947.

Supreme Court of the United States

In the Matter
of
THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, *Debtor.*

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, *Debtor-Petitioner,*

v.

METROPOLITAN LIFE INSURANCE COMPANY, as remaining member of the First and Refunding Group, CENTRAL HANOVER BANK AND TRUST COMPANY, et al., as Trustees, THE NATIONAL CITY BANK OF NEW YORK, as Trustee, J. HAMILTON CHESTON, et al., JOHN C. TRAPHAGEN, et al., JAMES G. BLAINE, et al., *Respondents.*

OCTOBER TERM, 1947

No. 184-189

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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August 8, 1947.

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Supreme Court of the United States

OCTOBER TERM, 1947

No. 184–189

In the Matter

of

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,

Debtor.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,

Debtor-Petitioner,

v.

METROPOLITAN LIFE INSURANCE COMPANY, as remaining member of the First and Refunding Group, CENTRAL HANOVER BANK AND TRUST COMPANY, et al., as Trustees, THE NATIONAL CITY BANK OF NEW YORK, as Trustee, J. HAMILTON CHESTON, et al., JOHN C. TRAPHAGEN, et al., JAMES G. BLAINE, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The respondents are the Protective Committee for The Chicago, Rock Island & Pacific Railway Company General Mortgage Bonds; the Trustees under The Chicago, Rock Island & Pacific Railway Company General Mortgage;

Metropolitan Life Insurance Company, as remaining member of the First and Refunding Group; the surviving Trustee under The Chicago, Rock Island & Pacific Railway Company First and Refunding Mortgage; the Trustee for the Secured 4½% Bonds, Series A, of The Chicago, Rock Island & Pacific Railway Company; the Protective Committee for the First Mortgage 4½% Bonds of the Rock Island, Arkansas and Louisiana Railroad Company; and the Protective Committee for Choctaw, Oklahoma and Gulf Railroad Company Consolidated Mortgage 5% Bonds and Choctaw and Memphis Railroad Company First Mortgage 5% Bonds.

This opposing brief is submitted under the number and title of the Debtor's application for certiorari. However, two additional petitions for certiorari have been filed seeking to review the same decision of the Circuit Court of Appeals,—one by the Preferred Stock Committee (No. 178-183) and the other by Gerald Axelrod, *et al.*, holders of unsecured Convertible Bonds (No. 190-193). The contentions made in the three petitions overlap, and to avoid duplication of opposing briefs the present brief will deal with all three petitions.

Two of the petitioners, the Preferred Stock Committee and the Debtor, have no real interest in the proceeding. The Interstate Commerce Commission found that the old stock had no value and in this was sustained by the District Court and the Circuit Court of Appeals when they approved the Plan, with petitions for writs of certiorari being denied by this Court. Consequently, the plan was never submitted to the stock interests for vote and they had no standing to appear in connection with confirmation in the courts below where the only issue was whether there had been justification for rejection of the plan by any class of creditors.

The third petitioner, a group of individual holders of a comparatively small but unspecified number of unsecured

Convertible Bonds, is not really representative of such bonds which have been represented in the proceeding by the Chase National Bank as Trustee under the Indenture for such bonds. Attorneys for this petitioner have pursued such an obstructive course throughout the proceeding that the Commission held that they had not made any contribution to the plan and refused them any allowance for fees or expenses (252 I. C. C. 209, 256-7; 254 I. C. C. 858). Their present petition and brief, like their previous briefs, is full of misstatements, misuses of figures and irrelevancies.

Opinions Below.

The first plan approved by the Interstate Commerce Commission resulted in numerous objections, which were passed upon by the District Court in *In re Chicago, Rock Island & Pacific Ry. Co.* (D. C. N. D. Ill. E. D. 1943), 50 F. Supp. 835. The District Court overruled most of the objections but sustained two and remanded the plan to the Commission, suggesting certain changes in addition to those necessary to meet the objections which it had sustained.

The modified plan, approved by the Commission on May 1, 1944, was approved by the District Court in an opinion dated May 14, 1945. *In re Chicago, Rock Island & Pacific Ry. Co.*, 67 F. Supp. 547. Appeals were taken to the Circuit Court of Appeals which affirmed the order of approval in *The Chicago, Rock Island & Pacific Ry. Co.* v. *Fleming* (C. C. A. 7, 1946), 157 F. (2d) 241.

Petitions for writs of certiorari were filed by the same three petitioners who filed the petitions now before this Court, and all were denied. *The Chicago, Rock Island & Pacific Ry. Co.* v. *Fleming* (1946), 329 U. S. 780; *Harrison* v. *Fleming* (1946), 329 U. S. 780; *Axelrod* v. *Fleming* (1947), 329 U. S. 811.

After the submission of the plan by the Commission to the creditors for acceptance or rejection, the District Court refused to confirm the plan, and directed that it be remanded to the Commission, in an opinion which is not reported but will be found in the printed record (R. 249-253). Appeals were then taken by the respondents to the Circuit Court of Appeals which reversed the order of the District Court and directed the District Court to confirm the plan. *In re Chicago, Rock Island & Pacific Ry. Co.* (C. C. A. 7, 1947), 160 F. (2d) 942. The Debtor's petition and the companion petitions of the Preferred Stock Committee and of Gerald Axelrod *et al.* are for writs of certiorari to review the order of the Circuit Court of Appeals directing the District Court to confirm the plan.

The companion petition of Gerald Axelrod *et al.* refers to other steps in the reorganization proceedings in connection with which opinions have been filed:

Aaron Colnon, the Co-Trustee appointed by District Judge Igoe, filed a petition on September 30, 1946, asking for authority to carry out what was "a new plan for the partial reorganization of the debtor", as the Circuit Court of Appeals later ruled. This "new plan" had never been before the Interstate Commerce Commission as required by Section 77. Mr. Colnon's petition is attached to the copy of the statement of Mr. Colnon which has been filed in this Court by Gerald Axelrod *et al.* and which is referred to in their brief at page 44. On November 22, 1946, District Judge Igoe handed down an order "which in substance approved a new plan for the partial reorganization of the debtor and authorized the initial steps toward the consummation of the new plan." This characterization of the order is taken from the opinion of the Circuit Court of Appeals, which reversed the order. *In re Chicago, Rock Island & Pacific Ry. Co.* (C. C. A. 7, 1947), 160 F. (2d) 949. Judge Igoe handed down no opinion when he approved Mr. Colnon's new plan.

After the Circuit Court of Appeals had entered its two orders, one directing the District Court to confirm the plan which had been approved by the Commission, by the District Court and by the Circuit Court of Appeals, and the other reversing the District Court's approval of Mr. Colnon's new plan, Judge IGOE undertook to change the Commission's plan before confirming it so that the District Judge would have the power to name a majority of the reorganization managers. Under the plan a majority of the reorganization managers can, among other things, name the members of the first board of directors. Judge IGOE's opinion of May 23, 1947, not reported, and his so-called "Order Confirming Plan of Reorganization" of the same date can be found in the brief of the petitioners Gerald Axelrod *et al.* at pages 64-78. The present respondents filed a petition with the Circuit Court of Appeals for a writ of mandamus directing the District Court to carry out the mandate of the Circuit Court of Appeals and confirm the plan without change, and, after argument, the Circuit Court of Appeals granted the writ and rendered an opinion, not yet reported, a copy of which can be found at pages 79-82 of the brief of the petitioners Gerald Axelrod *et al.*

JURISDICTION.

Petitioners invoke the jurisdiction of this Court under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. Sec. 347(a)), and Section 24(c) of the Bankruptcy Act (11 U. S. C. Sec. 47(c)).

QUESTION PRESENTED.

If there can be said to be any question presented by the petition of the Debtor and the companion petitions, it is whether or not a District Court has an unfettered dis-

cretion to refuse to confirm a plan of reorganization, i. e., a personal power, arbitrarily and without regard to the record before the District Court, to remand to the Interstate Commerce Commission a previously approved plan and thus to effect a "blockade" of further reorganization. We submit that there is no basis for the contention that the District Court was vested with an unrestricted personal power to refuse to confirm the plan,—a power not subject to review no matter how arbitrarily exercised.

As a part of this question, petitioners argue that the order of the District Court was not appealable because of the absence from Section 77 itself of any express provision for review. However, orders of the District Court in proceedings under Section 77 of the Bankruptcy Act, whether interlocutory or final, are clearly reviewable under Section 24(a) of the Bankruptcy Act.

STATEMENT OF THE CASE.

A relatively brief statement of the case, together with the opinion which the Circuit Court of Appeals handed down when it directed the District Court to confirm the plan, will be sufficient to establish that none of the three petitions raises any substantial questions for decision by this Court.

Brief History of the Proceeding Prior to the Hearing on Confirmation: On June 7, 1933, more than 14 years ago, this proceeding was commenced with high hopes for reasonably prompt reorganization. Due to a combination of circumstances the hearings before the Interstate Commerce Commission were not commenced until October 6, 1936, and were not concluded until July 27, 1938. In September, 1939, the hearing Examiner issued a proposed report. On October 31, 1940, the Commission issued a report and order approving a plan of reorganization. *Chicago, Rock Island & Pacific Ry. Co. Reorganization,*

242 I. C. C. 298. Petitions for modifications were thereafter filed within the 60-day period allowed by Section 77, and on July 31, 1941, a supplemental report approving an amended and modified plan was issued by the Commission. *Chicago, Rock Island & Pacific Ry. Co. Reorganization,* 247 I. C. C. 533. On October 2, 1941, the Commission issued a report on further consideration to correct "certain errors and inconsistencies in the approved plan which should be eliminated." *Chicago, Rock Island & Pacific Ry. Co. Reorganization,* 249 I. C. C. 297.

Hearings on the objections to the plan were held in the District Court in October, 1941. But the decisions of the Circuit Courts of Appeals in the *Western Pacific* and *Milwaukee* cases and this Court's allowance of writs of certiorari to review those decisions resulted in a suspension of further proceedings in connection with the plan until this Court handed down its opinions in *Ecker* v. *Western Pacific Railroad Corp.* (1943), 318 U. S. 448, and *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Co.* (1943), 318 U. S. 523.

After this Court's opinions in those two cases had been handed down, further briefs were submitted to the District Court and in June, 1943, that Court disapproved the plan and remanded it to the Commission. *In re Chicago, Rock Island & Pacific Ry. Co.,* 50 F. Supp. 835. While the District Court disapproved the Commission's plan, it overruled most of the very large number of objections which had been filed thereto and sustained only two—one relating to the treatment of the underlying General Mortgage Bonds, which was disapproved in the light of this Court's opinion in the *Milwaukee* case, and the other relating to the ratification of the nominations of reorganization managers. In addition, however, the District Court pointed out that the large accumulations of earnings would permit the Commission to provide for (1) a large cash distribution, (2)

the elimination of any provision for the sale of new first mortgage bonds to raise cash, and (3) the distribution to the creditors of an additional amount of first mortgage bonds equal to those which would have been sold under the plan previously approved by the Commission.

A further hearing was held by the Commission in September, 1943, and on January 3, 1944, the Commission issued a further report and order approving an amended and modified plan. *Chicago, Rock Island & Pacific Ry Co. Reorganization,* 257 I. C. C. 265. Petitions for further modifications were then filed within the 60-day period allowed by the statute, and on May 1, 1944, the Commission issued its final order modifying in minor respects the plan which had been approved on January 3, 1944. *Chicago, Rock Island & Pacific Ry. Co. Reorganization,* 257 I. C. C. 307.

At the hearing in September, 1943, and in the briefs filed with the Commission prior to the reports of January 3, 1944, and May 1, 1944, substantially all the contentions now advanced by the petitioners were urged before the Commission. One of the contentions now made by the Debtor and by the other petitioners is that the Commission failed to consider alleged changed circumstances, the accumulation of war earnings, etc. As we will point out in more detail below, (1) the Commission made drastic changes in the plan which it had previously approved, so as to recognize the accumulation of war earnings, providing for a cash distribution of $38,011,922 and for the distribution to the creditors of $11,000,000 of First Mortgage Bonds which were to be sold for new money under the original plan, and (2) as clearly appears from the passages in the reports of the Commission which were later quoted by the Circuit Court of Appeals (R. 341-342), the Commission considered whether the war earnings justified a permanent increase in the capital structure and decided that they did not.

After the Commission's order of May 1, 1944, had been certified to the District Court, a hearing was held on the objections to the approval of the plan on June 23, 1944. A long period then elapsed before the District Court passed upon the objections. In the meantime the District Court ordered that the claim of the Reconstruction Finance Corporation be paid. Subsequently on May 14, 1945, the District Court filed its opinion approving the plan, and on June 15, 1945, an order approving the plan was entered. *In re Chicago, Rock Island & Pacific Ry. Co.*, 67 F. Supp. 547.

Appeals were immediately taken to the Circuit Court of Appeals by the three present petitioners. While the necessary steps were being taken in connection with those appeals, the Commission submitted the plan to the creditors for acceptance or rejection pursuant to the provisions of Section 77 of the Bankruptcy Act.

The results of the submission were certified by the Commission to the District Court on February 28, 1946. The certification disclosed that the holders of the mortgage bond issues (other than the Little Rock and Hot Springs Western First Mortgage Bonds) who voted on the approved plan voted to accept it as follows (R. 93-104):

General Mortgage Bonds	94.89%
First and Refunding Mortgage Bonds	97.70%
Secured 4½% Bonds, Series A	98.17%
Burlington, Cedar Rapids & Northern Railroad Company Consolidated Mortgage Bonds	96.11%
Choctaw, Oklahoma & Gulf Railroad Company Consolidated Mortgage Bonds	97.90%
Rock Island, Arkansas and Louisiana Railroad Company First Mortgage Bonds	96.72%
St. Paul and Kansas City Short Line Railroad Company First Mortgage Bonds	97.71%

A majority in amount of those voting in two classes, the holders of the Little Rock and Hot Springs Western First Mortgage Bonds and the holders of the unsecured Convertible Bonds, voted to reject the plan.

It may be noted at this point that no representative of any holder of the Little Rock and Hot Springs Western First Mortgage Bonds later objected to the confirmation of the plan and that the District Court's refusal to confirm the plan was not based on the vote of the holders of the Little Rock and Hot Springs Western First Mortgage Bonds.

The appeals from the District Court order approving the plan were not argued in the Circuit Court of Appeals until April 11, 1946. Consequently the results of the submission, as certified by the Commission on February 28, 1946, were forcefully brought to the attention of the Circuit Court of Appeals in the briefs and on the argument.

On May 23, 1946, the Circuit Court of Appeals unanimously affirmed the District Court's approval of the plan. *The Chicago, Rock Island & Pacific Ry. Co.* v. *Fleming*, 157 F. (2d) 241.

Three petitions for writs of certiorari to review the order of the Circuit Court of Appeals were then filed with this Court by the present three petitioners. The contentions now advanced by the petitioners were presented to this Court in those petitions (except only the contention which is now made that the District Court's refusal to confirm could not be reviewed on appeal). All three petitions were denied, two on November 18, 1946, and the third on February 3, 1947. *The Chicago, Rock Island & Pacific Ry Co.* v. *Fleming* (1946), 329 U. S. 780; *Harrison* v. *Fleming* (1946), 329 U. S. 780; *Axelrod* v. *Fleming* (1947), 329 U. S. 811.

The District Court's Refusal to Confirm the Plan: Considerably before the argument in the Circuit Court of

Appeals with respect to the approval of the plan, the District Court had ordered a hearing on the confirmation of the plan. However, requests for adjournment were made and by a succession of orders the confirmation hearing was adjourned until June 11, 1946.

The reasons urged for these adjournments were that (R. 138):

1. The District Court should await the outcome of the appeals to the Circuit Court of Appeals from the District Court's order approving the plan.

2. The District Court should await the decision of this Court in *Reconstruction Finance Corporation* v. *Denver & Rio Grande Western Railroad Company.*

3. The District Court should await legislation by Congress affecting railroad reorganizations.*

The Circuit Court of Appeals affirmed the approval of the plan on May 23, 1946. The confirmation hearing was held on June 11, 1946, as already noted. This Court's opinion in *Reconstruction Finance Corporation* v. *Denver & Rio Grande Western Railroad Company,* 328 U. S. 495, was handed down on June 10, 1946 and copies were available in Chicago at the time of the hearing on June 11, 1946 and briefs on the objections to the confirmation were filed in which this Court's opinion in the *Denver* case was fully discussed. However, on June 28, 1946, the District Court handed down an opinion and order refusing to confirm the plan and referring the case back to the Interstate Commerce Commission (R. 249-255).

The District Court's opinion is an extraordinary document.

Although the hearing on the confirmation had been deferred over three months and the reasons given were

* This Court's two opinions in the *Denver* case disclose that it is familiar with developments in Congress relating to railroad reorganization legislation. A bill, S.1253, was passed by both houses of Congress on or about August 3, 1946, and disapproved by the President on or about August 13, 1946. No further legislation has thus far been passed.

that the District Court should have the benefit of the opinion of the Circuit Court of Appeals on the appeals relating to the approval of the plan and of this Court's opinion in the *Denver* case, the District Court did not so much as mention either of those opinions and its rulings were made in the teeth of both of them.

Much the largest part of the opinion was devoted to a discussion of what was taking place in Congress and what was being said about railroad reorganizations (R. 250-252, 253). The District Court based its decision primarily on Congressional comments despite the explicit statement on that subject in this Court's opinion in *Reconstruction Finance Corporation* v. *Denver & Rio Grande Western Railroad Company,* 328 U. S. 495, 509-511, the gist of which is that it is the duty of the courts to enforce the statutes as they are, not to base their decisions on possibilities of future legislation. This Court's statement on the subject was quoted fully to the District Court in the joint brief filed on behalf of those who were urging confirmation of the plan but apparently no attention whatever was paid to it.

In a comparatively short passage (R. 252), which the Debtor has quoted in its petition (p. 4), the District Court purported to refer to the factual situation. However, as the Circuit Court of Appeals later pointed out in its opinion (R. 334-335, footnote 1):

> "In his [the District Court's] opinion, no distinction was made between developments which took place prior to the approval of the plan by the Commission on May 1, 1944, or the District Court on June 15, 1945, and developments which took place after one or both of those dates * * *."

Indeed, as we shall point out later, all of the developments of any importance to which the District Court referred took place prior to the approval of the plan.

The District Court's order was also extraordinary, not only in that it constituted a refusal to confirm the plan, but because it contained an express finding that the plan "does not make adequate provision for fair and equitable treatment for the interests or claims of the holders of the Convertible Bonds" (R. 254). This holding was, of course, the exact reverse of the holding which the District Court had previously made in approving the plan, and which the Circuit Court of Appeals had affirmed unanimously. Furthermore, in approving the plan the District Court had discussed the objections of the group of Convertible Bondholders in some detail and had overruled them, *In re Chicago, Rock Island & Pacific Ry. Co.* (1945), 67 F. Supp. 547, 551, and they had been discussed in the opinion of the Circuit Court of Appeals affirming the District Court's approval of the plan. *The Chicago, Rock Island & Pacific Ry. Co.* v. *Fleming* (1946), 157 F. (2d) 241, 249-250. Yet the District Court's opinion refusing to confirm the plan did not so much as mention the Convertible Bonds except in a general statement (R. 253) that the Court was "holding out hope to the junior creditors" but that "it would be vain for the junior creditors to expect to be made whole."

The Appeals to the Circuit Court of Appeals and Other Developments: The present respondents immediately appealed to the Circuit Court of Appeals from the District Court's refusal to confirm the plan and the appeals were brought on as promptly as possible. However, they could not be heard until January 30, 1947.

In the meantime Co-Trustee Colnon brought on the petition, already mentioned, a copy of which is attached to Mr. Colnon's statement filed by the petitioners Gerald Axelrod *et al.* and referred to in their brief at page 44. As will be seen from Mr. Colnon's petition, he proposed an entirely new plan, contemplating that to a very large extent it would be carried out by the District Court quite

independently of the Interstate Commerce Commission by buying in mortgage bonds and effecting various exchanges of securities and that thereafter the balance of the plan would be sanctioned by the Interstate Commerce Commission. Mr. Colnon's proposal contains so many illegal and inequitable features that it seems superfluous to stress any of them, but it will be observed from page 4 of his statement that, while the Commission approved a total bonded indebtedness of $110,917,060, Mr. Colnon proposed a total bonded indebtedness of $210,406,000. His whole plan and all his assertions as to the fairness of his plan—untenable as they were for many other reasons—were predicated on a mere assumption that the Commission would adopt the capital structure which he proposed.

On November 22, 1946, after hearing the opposition to Mr. Colnon's plan, the District Court entered an order which was later correctly described by the Circuit Court of Appeals: the order "in substance approved a new plan for the partial reorganization of the debtor and authorized the initial steps toward the consummation of the new plan." Appeals were duly taken from the order of November 22, 1946, and the appeals from that order were argued at the same time as the appeals from Judge Igoe's order of June 28, 1946, refusing to confirm the plan.

Because of the importance of the case the Circuit Court of Appeals set the appeals down for argument specially and an entire Court day was devoted to the arguments on January 30, 1947. Much the largest part of the time taken on the arguments was devoted to the appeals from the order relating to the confirmation of the plan, to which the pending petitions for certiorari relate.

The appellants—the present respondents—contended that Judge Igoe had utterly ignored the applicable rules of law in passing on the question of confirmation; that

those rules of law as applied to the facts in the record required that the plan be confirmed; and that the Circuit Court of Appeals should reverse Judge IGOE's arbitrary action and direct him to confirm the plan.

On February 21, 1947, the Circuit Court of Appeals handed down two opinions reversing the two orders appealed from. Petitions for rehearing were subsequently filed and were denied on April 7, 1947.

Unlike the opinion of the District Court, the opinion of the Circuit Court of Appeals discussed the facts carefully and accurately, leading to a judicial conclusion based on the facts and applicable rules of law as laid down by this Court in *Reconstruction Finance Corporation* v. *Denver & Rio Grande Western Railroad Company* (1946), 328 U. S. 495. Reference will be made later to particular subjects dealt with in the opinion. A reading of the opinion, however, will demonstrate that all of the parties received the benefit of the kind of judicial decision to which they were entitled—an application of the law to the facts of the case.

Since the petitions relate to the order of the Circuit Court of Appeals directing that the plan be confirmed, developments subsequent to entry of that order are hardly relevant. But they should be mentioned briefly, since they are referred to by the petitioners Gerald Axelrod *et al.*

Instead of confirming the plan, as the Circuit Court of Appeals had directed, Judge IGOE filed an opinion and order on May 23, 1947, by which he undertook to change the plan so as to have the power himself to appoint three of the five reorganization managers. (See brief of Gerald Axelrod *et al.*, p. 64-78.) Since the reorganization managers will name the first Board of Directors, the power to appoint a majority of the reorganization managers is potentially equivalent to the power to name

the original Board of Directors. A petition for a writ of mandamus was filed with the Circuit Court of Appeals by the respondents and, after argument, it was granted and the District Court then eliminated its attempted change in the plan (*id.* 79-82).

Other efforts to defeat the plan which took place during the period subsequent to the Circuit Court of Appeals, order of February 21, 1947 are, with one exception, not disclosed by the record in this Court. The exception is the statement submitted by Mr. Colnon, Co-Trustee appointed by Judge IGOE, before a subcommittee of the Senate Committee on Interstate and Foreign Commerce, which has been filed by Gerald Axelrod *et al.* It is unnecessary to discuss that statement except to say that a mere reading of it will show that Mr. Colnon (acting independently of the Senior Trustee, who was appointed by the Judge administering the case before Judge IGOE took over the administration, from a panel named by the Interstate Commerce Commission) sponsored a new plan, which was illegal and grossly inequitable and then attempted to support his new plan by baseless charges against those who sought consummation of the approved plan.

ARGUMENT.

I.

THE FACTS OF THIS CASE ARE EXTRAORDINARILY SIMILAR TO THOSE IN *RECONSTRUCTION FINANCE CORPORATION* v. *DENVER & RIO GRANDE RAILROAD COMPANY*, 328 U. S. 495.

The facts of this case are amazingly similar to those in *Reconstruction Finance Corporation* v. *Denver & Rio Grande Railroad Company* (1946), 328 U. S. 495.

In the *Denver* case the senior bondholders voted to accept the plan, as have the senior bondholders in this

case with the exception of the holders of the Little Rock and Hot Springs Western First Mortgage Bonds, whose failure to cast a favorable vote is not significant in view of the absence of any objection to the confirmation of the plan on that ground.

In the *Denver* case 79.33% of the holders of the junior bond issue voting on the plan cast adverse ballots. In this case 75.78% of the holders of the unsecured Convertible Bonds and other unsecured claims who voted cast adverse ballots.

The *Denver* plan was approved by the Commission on June 14, 1943, and called for an "effective date" of January 1, 1943. The Rock Island plan was approved by the Commission on May 1, 1944, and called for an "effective date" of January 1, 1944.

The war earnings of the two railroads preceding and following the approval of the plans were very much greater than the "normal" earnings forecast by the Commission.

In each case the plan was approved by the Commission at a time of extraordinarily large earnings and subsequent earnings declined. This will appear from the following table of their earnings before interest charges, the *Denver* earnings being taken from this Court's opinion (328 U. S. 514, 518) and the Rock Island earnings being taken from the opinion of the Circuit Court of Appeals (R. 339) and from the record (R. 242):

Year	*Denver*	*Rock Island*
1942	$17,044,420	$35,112,693
1943	11,573,668	37,037,708
1944	8,157,880	26,415,919
1945	—	20,444,571

As appears from page 30 of the Debtor's petition, the Rock Island's earnings before interest in 1946 were

$16,578,161, so that in each of the years 1944, 1945 and 1946 there was a substantial decline in earnings from those of the previous year.

In each of the two cases large amounts of cash accumulated in the estate subsequent to the so-called "effective date" of the plan. The principal reasons for the accumulations were (1) the exceptionally large earnings and (2) the failure to pay out any of the earnings as interest on the old securities or to pay interest or dividends on the new securities from the "effective dates" of the respective plans.

In each case some of the accumulated earnings were used to retire debt and the retirement of debt was urged as a ground for a reconsideration of the plan approved by the Commission.

As already noted, this Court's opinion in *Reconstruction Finance Corporation* v. *Denver & Rio Grande Railroad Company,* 328 U. S. 495, was handed down on June 10, 1946, prior to Judge IGOE's refusal to confirm the plan and it was fully briefed in the District Court. Yet Judge IGOE's opinion does not mention the *Denver* opinion and the grounds which he advanced for refusing to confirm the plan were advanced in the teeth of the most explicit rulings by this Court.

II.

THERE ARE FACTORS PRESENT IN THIS CASE WHICH ASSURE THE FAIRNESS OF THE ROCK ISLAND PLAN.

As the Circuit Court of Appeals found in its two opinions, the plan approved by the Commission fails to provide in full for the claims of the mortgage bondholders and the aggregate amount of the deficiencies on the various issues is more than $106,000,000 (157 F. (2d) 241, 246-8;

160 F. (2d) 942, 943).* In addition, unsecured creditors have a deficiency of $39,600,000 (taking new no par common stock at $50 a share) which makes a total creditor deficiency of $145,000,000 which is not provided for in the plan of reorganization.

The claims of the stockholders accordingly were held to be without value by the District Court, the Circuit Court of Appeals affirmed, and this Court refused to review the order of the Circuit Court of Appeals, as already noted.

Furthermore, although Judge IGOE refused to confirm the plan, he said that (p. 253):

> "with the most optimistic approach by the Commission it would be vain for the junior creditors to expect to be made whole."

It follows that even in Judge IGOE's view there was nothing left for the stockholders, if the rule of priorities enunciated by this Court in the *Western Pacific* and *Milwaukee* cases is to be followed.

In view of the enormous amount, over $145,000,000, which would have to be made up before the stockholders could participate, the only possible issues in this case re-

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*This appears from the following table showing the deficiencies in the secured creditors claims which would remain after receipt of the new securities and cash allocated to them under the plan of reorganization (257 I. C. C. at p. 319). The deficiencies are calculated by taking new no par value common stock at $50 per share, the amount which it has been adjudicated by the Commission and the District Court to be worth in determining that the General Mortgage Bonds will have no deficiency under the present plan (257 I. C. C. at pp. 276-83, 310-12; 67 F. Supp. at p. 549).

Secured Claims	Claim at Jan. 1, 1944	Deficiency taking new common at $50
General Mortgage	$ 86,213,400	None
C. & M. First Mortgage	5,286,000	None
First and Ref.	156,870,859(A)	$ 57,606,900
Secured 4½s	59,021,174	18,569,382
C. O. & G.	8,296,867	872,239
St. P. & K. C. S. L.	27,495,118(A)	13,404,485
R. I. A. & L.	16,362,500	5,922,916
B. C. R. & N.	16,912,500	9,539,383
Total	$376,458,418	$105,915,305

(A) Includes bonds now outstanding, formerly pledged for bank loans.

lated to the treatment of the various classes of creditors. And the basis for Judge IGOE's order refusing to confirm the plan was, as stated in his order but not in his opinion, that it did not provide for "fair and equitable treatment for the interests or claims of the holders of the Convertible Bonds" (R. 254).

The original fairness of the plan to the holders of the Convertible Bonds was established by the decision of the District Court approving the plan, by the affirmance of that decision by the Circuit Court of Appeals and by this Court's refusal to grant writs of certiorari. And the Rock Island plan contains a feature which prevents changes in conditions from making an originally fair plan subsequently unfair to the holders of the Convertible Bonds except in one contingency so remote as not to require serious mention.

That feature of the plan is this: under the plan an allotment of new common stock is made to every class of creditors, including the holders of the Convertible Bonds. The allotment of new common stock made to the holders of the Convertible Bonds and other unsecured claims was based on the value, as found by the Commission, of the unmortgaged assets. There was allotted to the unsecured creditors *all* the securities (common stock) to be issued in respect of the unmortgaged assets. The secured creditors did not share in such securities even in respect of their deficiency claims. The allotments of common stock made to the secured creditors were based on the value of the mortgaged assets as found by the Commission. As a result the plan operates automatically to meet any changes in conditions. As the Circuit Court of Appeals said (R. 333-334):

> "Under the plan, out of a total issue of 1,522,672 shares of the common stock, 160,078 shares are allotted to the holders of the Convertible Bonds. The result was to provide for the holders of these bonds a 10.68% interest in the equity of the reorganized

company, and if the plan is consummated, the Convertible bondholders will participate in any larger earnings than the Commission's forecast anticipated."

If the earnings had increased unexpectedly, or if it had proved possible to retire more debt than had been visualized when the plan was approved, the plan would not thereby have become inequitable, since the holders of the Convertible Bonds would receive the benefit through their participation in the common stock allotment. They would receive proportionately greater benefit than secured creditors from subsequent developments favorable to the new common stock equity since their entire recognition is in new common stock, and secured creditors, obtaining most of their recognition in senior securities with limited interest or dividend rights, would have relatively less benefit from developments favorable to the common stock equity. In other words, the unmortgaged assets to which unsecured creditors would have a right to look were at most 5% of the total assets, yet the unsecured creditors, through getting 10% of the Common Stock, receive 10% (not just 5%) of the excess earnings of all the properties over and above the limited amounts needed to service the senior securities.

The only contingency in which the plan could have become unfair would have been the realization of unanticipated earnings so great as to result in actually overpaying one or more classes of secured bonds. It has not been and could not be seriously contended that that has taken place. We have already presented in an earlier footnote herein a table showing that most of the secured classes of creditors have enormous deficiencies which are not to be recognized under the plan, even in face amount of new securities. That table calculated the deficiencies taking new common stock at $50 a share, but there would still be enormous deficiencies if new common stock is taken at $100 a share.

The only petitioners mentioning the subject are Gerald Axelrod, et al., who argue briefly that the holders of the General Mortgage Bonds are overcompensated (p. 50-51). Those petitioners undertake to show that the plan results in over-compensation of the holders of the General Mortgage Bonds but they do so by (1) disregarding the large claim on a General Mortgage Bond for accrued interest to the "effective date" of the plan and thus grossly understating the amount of the claim, and (2) treating the new no par value common stock as if it were allotted at $100 per share, whereas it was allotted at approximately $50 per share, as appears in the petitioners' brief (p. 50).

Later we will show, using market value tables similar to those used in *Insurance Group Committee* v. *Denver & R. G. W. R. Co.* (1947), 329 U. S. 811, that any contention that any of the secured creditors are over-compensated is wholly without substance.

III.

THE REASONS ADVANCED BY THE DISTRICT COURT AND BY THE PETITIONERS WHY THE PLAN SHOULD NOT HAVE BEEN CONFIRMED ARE WHOLLY WITHOUT MERIT.

The Debtor bases its petition on the grounds advanced by Judge Igoe for his refusal to confirm the plan (p. 4), and if the numerous contentions advanced by the other petitioners be analyzed, it will be found that most of them are similar to those urged by the Debtor.

The reasons for Judge Igoe's refusal to confirm the plan, as disclosed by his opinion, fall into two categories.

A. Possibilities of Legislation.

Much the largest part of Judge Igoe's opinion consisted of quotations from statements made in Washington critical of completed and pending plans (R. 249-252, 253).

In the brief filed by the appellants (these respondents) in the Circuit Court of Appeals it was established (p. 28-38) that some of the quoted statements were demonstrably incorrect and that others notably the quotations from certain testimony given by Commissioner Mahaffie of the Interstate Commerce Commission, had been torn from their context. It is unnecessary to make the same showing in this Court, since in *Reconstruction Finance Corporation* v. *Denver & Rio Grande Western Railroad Co.* (1946), 328 U. S. 495, 510-512, this Court said (footnotes omitted):

> "Although the results of reorganizations under the section, as thus construed, have been criticized as unfortunate and changes have been suggested, no different legislation has been enacted. Indeed a different method for reorganization, enacted in 1939 and designed to meet the requirements of railroads not in need of financial reorganization of the characted provided by § 77 but only of an opportunity for voluntary adjustments with their creditors, terminated on July 31, 1940, and a comparable provision made in 1942 was allowed to lapse on November 1, 1945. This situation leaves clear the duty of the agencies of the Government entrusted with the handling of reorganizations under § 77, including this Court, to administer its provisions according to their best understanding of the purposes of Congress as expressed in the words of § 77 read in the light of the contemporaneous discussion in Congress. Changes in economic conditions cannot affect the powers of the reorganization agencies even though such changes may require a re-examination into the present fairness of the former exercise of those powers."

B. Alleged Changed Conditions.

The District Court said in a passage quoted by the Debtor at page 4 (R. 252):

> "In the present case we have a plan that except for slight modifications was prepared by the Com-

mission in 1940 and rests on studies of earnings, etc., going back to 1937 and even beyond.

"Against that we find the Debtor today with cash or equivalent of over $70,000,000; with an R. F. C. loan aggregating, principal and interest in excess of $18,000,000 paid in full; with the entire first mortgage of the Peoria Terminal Co., to all intents and purposes paid in full; with over 20% of the Choctaw & Memphis first mortgage retired; and with an amazing reduction, in the interim, of equipment debt. Three classes of creditors set up in the original plan have disappeared—the banks, the R. F. C., and the Peoria Railway Terminal Co.

"The above recital does not take into account the tremendous sums expended over the period on improvement of road and equipment, nor does it include the retirement of debt on jointly owned facilities such as the Joliet and Denver terminals."

As the Circuit Court of Appeals subsequently pointed out (R. 334, footnote 1), "no distinction was made between developments which took place prior to the approval of the plan by the Commission on May 1, 1944, or the District Court on June 15, 1945, and developments which took place after one or both of those dates."

We shall briefly take up, item by item, the alleged changes in conditions which are mentioned in the District Court's opinion and in the petitioners' briefs.

(1) The Basis for the Plan; Study of Earnings.

The first point made by the Court was that (R. 252):

> "In the present case we have a plan that except for slight modifications was prepared by the Commission in 1940 and rests on studies of earnings, etc., going back to 1937 and even beyond."

As to this statement:

First: The first plan certified by the Commission to the Court, which was approved by the Commission in

July, 1941, provided for no cash distribution whatever and for the issuance of $11,000,000 of new first mortgage bonds which would be sold to raise new money (242 I. C. C. 298, 478). Extraordinary war earnings intervened between July, 1941 and May 1, 1944, when the plan now under consideration was approved by the Commission (257 I. C. C. 307). The Commission in 1944 accordingly eliminated the provision for the raising of new money and provided for the distribution to the creditors of (1) $38,011,922 of cash and (2) an additional $12,409,600 of first mortgage bonds, a total of $50,421,522. These modifications were not "slight". In effect, war earnings in the amount of over $50,000,000 were applied to the claims of the creditors under the plan. Even with these additional allotments, there still remained an enormous deficiency in the claims of secured creditors which was given no recognition whatever in the plan.

Second: While the capital structure approved in the first plan, certified in July, 1941, was not greatly changed by the second plan approved in May, 1944, the Commission's refusal to change it was the result of an exercise of its best judgment that war earnings were not a proper basis on which to found a permanent capitalization.

When the case was remanded to the Commission in 1943 vigorous requests were made for an increase in the capitalization, both before the Commission issued its report of January 3, 1944 and in connection with the petitions for modifications of that report.

The Commission considered in both its Report of January 3, 1944 and its Report of May 1, 1944 demands for changes in the capital structure which are altogether similar to those now made by the petitioners.

Exercising its judgment that the economic conditions which made the war earnings possible were not of a permanent character, the Commission rejected the demands

for important changes in the capitalization. The Circuit Court of Appeals later quoted in its opinion from each of these two reports of the Commission (R. 341).

A similar exercise of judgment by the Commission was not merely approved, but endorsed, by this Court in *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Co.* (1943), 318 U. S. 523, 543-544.

The District Court's criticism that the capital structure rests on "studies of earnings, etc., going back to 1937 and even beyond" will not survive analysis (R. 252). The "studies of earnings, etc., going back to 1937 and even beyond" were made in order to try to forecast the "normal" income of the future. Certainly, studies of the past are useful in an attempt to forecast the future.

Third: There were no unanticipated, large earnings after approval of the plan, such as referred to by this Court in *Reconstruction Finance Corporation* v. *Denver & Rio Grande R. R. Co.* (1946), 328 U. S. 495, 533-535. On the contrary, the unexpectedly early end of the war resulted in an earlier decline of the Rock Island's extraordinary war earnings than was presumably anticipated when the plan was approved. From the year in which the Commission held its hearing on the plan to and including the year in which Judge Igoe refused to confirm it, the decline was steady and substantial, as shown by the table previously given:

Year	*Earnings Before Interest*
1943	37,037,708
1944	26,415,919
1945	20,444,571
1946	16,578,161

Fourth: As noted in Point II, even if there had been unanticipated large earnings, the plan would not have been unfair on that account. This subject was not discussed by Judge Igoe, although fully briefed before him.

(2) 1947 Earnings.

All of the petitioners refer to the fact that thus far the earnings in 1947 have been better than in 1946, and various forecasts or assertions are made about earnings for the entire year of 1947. In addition, comparisons are made between those earnings and the interest charges on the old securities, as, for example, in the tables at the end of the Debtor's petition.

As to these contentions:

There is no reliable forecast of the earnings for the year 1947. Furthermore, it is a matter of common knowledge that railroads like the Rock Island are being greatly helped in 1947 by extraordinary grain movements to Gulf and other ports, and no one can tell how long those movements will last.

Even more important, a comparison of current earnings with old fixed charges is meaningless in the case of the reorganization of a railroad like the Rock Island, for two reasons:

1. The comparison wholly ignores the vast amount of accrued and unpaid interest. As of the "effective date" of the plan, the accrued and unpaid interest aggregated $130,889,661. This figure is obtained by a calculation from the table appearing in the Interstate Commerce Commission report approving the modified plan (257 I. C. C., at p. 318), with adjustments on account of the subsequent sale of pledged bonds by the Banks and the payment of the R. F. C. loan. The cash distribution of $38,011,922 provided for in the plan (less the $3,732,172 allotted to the R. F. C.) may be treated as applicable in reduction of the accrued and unpaid interest, but this still leaves almost $100,000,000 of accrued and unpaid interest as of January 1, 1944. Since that so-called "effective" date of the plan interest has accrued in an amount larger than $38,011,922.

Under this Court's decisions proper provision must be

made in a plan for accrued and unpaid interest. If such interest is not paid, the claims for it must be represented by new securities to the extent that there are new securities available for that purpose. Those new securities have to be serviced; if they are bonds, interest must be paid, and if they are stock, there should be a prospect that dividends will be paid. A calculation such as that made by the Debtor, which simply disregards accrued and unpaid interest, is, therefore, quite meaningless in considering whether a particular plan or reorganization is "fair and equitable" or whether it is feasible to develop a better one.

2. The earnings available for interest of $16,578,161 in 1946 are calculated after deduction of Federal income taxes which have been arrived at by deducting the annual interest on the old bonds. But under the plan of reorganization the interest charges are reduced to less than half of the present charges, with creditors being allotted stock for a large portion of their claims. No one has disputed that there had to be a substantial reduction in interest charges in any reorganization. It follows that interest deductions for income tax purposes would be reduced under the reorganization plan, and that the Federal income tax liability would be substantially increased. Using present tax rates, there would be an increase of several million dollars in the income tax liability, and a corresponding reduction of several million dollars in the $16,578,161 of 1946 earnings.

Furthermore, the petitioners, in claiming that the 1946 earnings available for interest of $16,578,161 were unexpectedly large, not only ignore the fact that these are the lowest annual earnings since the 1943 earnings of $37,000,000, but also give no recognition to the fact that $16,500,000 of earnings are barely sufficient to service the new bonds and preferred stock issuable under the plan of reorganization and leave earnings of about $3.50 per share of new common stock. Earnings of that amount on the new common stock can hardly be considered as unexpectedly

large in relation to the new capitalization. If some earnings had not been expected for the new common stock being allotted to creditors for their claims, the Interstate Commerce Commission would hardly have included it in the new capitalization. In the light of these earnings, the new common stock is selling on a "when issued" basis at only about 28½.

(3) The Accumulation of Cash.

The next statement made in the Court's opinion is that (R. 252):

> "we find the Debtor today with cash, or equivalent of over $70,000,000."

As already noted, when the District Court remanded the original plan to the Commission in June, 1943, it expressly suggested that any cash available for that purpose be distributed to the creditors. When the hearings were held before the Commission in September, 1943, statements were submitted by the Trustees showing how much cash could safely be distributed as of the proposed "effective date", January 1, 1944, and the Commission modified the plan to provide therein for distribution of all such available cash ($38,000,000). One of the Trustees who filed the statement was Co-Trustee Colnon, who later made many wildly exaggerated assertions as to the amount of "available" cash in the estate.

The actual situation will be found by examining a statement showing the total amount of cash and cash equivalents and the "net cash"—the "available" cash—on June 1, 1946 (R. 238-239). That statement was prepared by the Trustees of the Debtor and introduced as an exhibit by the Trustee of the Convertible Bonds at the confirmation hearing on June 11, 1946 and showed the actual situation at the time when Judge Igoe refused to confirm the plan.

The statement shows that, while there were cash and cash equivalents on June 1, 1946, of $77,563,059, the "net

cash" — the "free" or "available" cash — was only $10,997,108.

The principal reasons for the difference are accounted for by the following items:

Accrued Taxes, Cash Reserve and Working Capital	$33,886,514
Requirements for Additions and Improvements	12,313,130
Plan Requirements (to service the new Bonds and Preferred Stock only)	19,166,786

Of the first item, liabilities for taxes totaled $21,423,000. The balance of the first item and the second item require no explanation. The third item can be explained briefly.

As already stated, the plan has a so-called "effective date" of January 1, 1944. This means that the new bonds and preferred stock (and common stock, if it is to have any value) will be entitled to interest and dividends from that date and that the sinking funds will operate from that date. The $19,166,786 represents the plan requirements from January 1, 1944 to June 1, 1946 for the new bonds and preferred stock only, omitting any provision for dividends on the new common stock. If such dividends at the rate of $3.50 per share per annum were added, it would more than use up the available cash of $10,997,108.

The $10,997,108 of net cash, if not used for dividends on the new common stock from January 1, 1944 to June 1, 1946, would have to be used for (1) additions and improvements, (2) debt retirement, or (3) for other corporate purposes. For the period since January 1, 1944, the creditors have received no interest whatever.* For

* The cash distribution of $38,011,922 is applicable under the plan in reduction of their claims as of January 1, 1944 (257 I. C. C. 307, 318). Between 1934 and 1945, the creditors received no interest, so that the payment of this cash distribution in 1945, if all applied to interest accrued to January 1, 1944, would still leave a balance of accrued and unpaid interest at January 1, 1944 of almost $100,000,000.

the period of two years and five months to June 1, 1946, they are entitled either (1) to receive interest on their bonds, which would amount to over $30,000,000 for two years and five months, or (2) to have the "net cash," which represents earnings accumulated since January 1, 1944, used for dividends on the new common stock or for one of the other purposes just mentioned and to obtain the benefit of either the distribution of dividends or the increase in the value of their equity (represented by the new common stock allotted to the creditors under the plan of reorganization) which would result from the making of additions and improvements, from debt retirement, or from the accumulation of the earnings for other corporate purposes.

The clear and fundamental error in the District Court's brief reference to this subject—an error which was aggravated by the Court's erroneous assumption that anything like $70,000,000 could be paid out for any purpose (R. 252-3)—was pointed out by this Court in *Reconstruction Finance Corporation* v. *Denver & Rio Grande Western Railroad Company* (1946), 328 U. S. 495, 521:

> "The effective date of the plan was fixed by the Commission as January 1, 1943. This was in its power. The allocation of the securities took into consideration the interests of the secured claims to that date. Any gain or any loss after that time was a benefit or an injury to the new common stockholders and then sometimes to security holders in positions senior to them."

The right to any gain after the effective date of a plan necessarily carries with it the right to any cash which might be accumulated. On this subject this Court said (p. 518-519):

> "There is another important factor, corollary to stock ownership, to be noted in the Commission's allocation of these securities. This factor is that the

> creditors who received common stock to make them whole obtained with that common stock an interest in all cash on hand or all cash that might be accumulated. Of course, the Commission thoroughly understood this."

In the light of these factors this Court discussed the accumulation of cash in the *Denver* estate under the heading *"Cash and War Earnings"* (p. 520-524). In the interests of brevity we will not quote the entire discussion; the essence is in the concluding paragraph (p. 523-524):

> "The error of the Circuit Court in its holding set out above lies in its assumption that the senior bondholders were paid in full by the securities allotted to them without also accepting the determination of the Commission that the assets represented as of January 1, 1943, and all subsequent earnings were a part also of the common stock that was awarded the senior bondholders."

The cash situation in the present case was fully and accurately discussed in the opinion of the Circuit Court of Appeals (R. 336-337).

(4) Payment of the Claim of the R. F. C.

The District Court's opinion next says that (R. 252):

> "an R. F. C. loan aggregating, principal and interest, in excess of $18,000,000 (had been) paid in full".

The claim of the R. F. C. was paid May 15, 1945 before the District Court entered its order of June 14, 1945 approving the plan (R. 244; 67 F. Supp. 547). The payment consequently preceded, and it was discussed in, the opinion of the Circuit Court of Appeals affirming the approval of the plan (157 F. (2d) 241, 247 footnote 1). And by a still longer period it preceded this Court's

denials of certiorari to review the order of the Circuit Court of Appeals.

In the District Court's opinion approving the plan the District Court advanced sound reasons why the payment of the claim of the R. F. C. did not require the disapproval of the plan (67 F. Supp. 547, 553). Those reasons were substantially similar to the reasons which this Court later gave in its opinion in *Reconstruction Finance Corporation* v. *Denver & Rio Grande* (1946), 328 U. S. 495, 525, as to why a reduction of senior debt does not require a new plan:

> "When the reduction of senior capital takes place after the adoption of the plan by use of anticipated earnings or existing cash, there can be no such readjustments of junior participation because assets in the balance sheet at the adoption of the plan and subsequent earnings are, as we have pointed out, for the benefit of the stockholders in the new company so that through these common stock advantages these new stockholders may be compensated for their loss of payment in full in cash."

The payment of the claim of the R. F. C., like all other points mentioned by the District Court, was fully discussed in the opinion of the Circuit Court of Appeals (R. 337-338).

(5) Payment of the Peoria Terminal Company First Mortgage; Retirement of Part of the Choctaw & Memphis First Mortgage Bonds; and Retirement of the Joliet and Denver Terminal Bonds.

The District Court said that (R. 252):

> "the entire first mortgage of the Peoria Terminal Co. (has been) to all intents and purposes paid in full";

and that

> "over 20% of the Choctaw & Memphis first mortgage (have been) retired".

It also mentioned:

> "the retirement of debt on jointly owned facilities such as the Joliet and Denver Terminals".

The "entire first mortgage" of the Peoria Terminal Company is only $928,000; 20% of the Choctaw & Memphis First Mortgage Bonds would be $704,800 (257 I. C. C. 307, 318); and the cost of retiring the debt of the Joliet and Denver facilities is $824,000. The total of the three items is $2,456,800.

The amount is insignificant in relation to the deficiencies in the claims of those mortgage bond creditors whose claims will not be satisfied under the plan or in relation to the accruals of interest between January 1, 1944, and June 1, 1946, amounting to more than $30,000,000, which would have to be provided for if the plan were remanded to the Commission. The principle involved is exactly the same as that presented by the payment of the claim of the R. F. C.

These minor items of debt reduction were all discussed in the opinion of the Circuit Court of Appeals (R. 337-338).

(6) Reduction in Equipment Debt.

The Court next mentioned (R. 252):

> "an amazing reduction, in the interim, of equipment debt".

It did not say what the reduction was or what it meant by "the interim".

The facts with respect to the equipment debt illustrate how far Judge Igoe went in considering changes in conditions which took place *prior to the approval of the plan.*

On January 1, 1944 the equipment debt was $11,909,000 (257 I. C. C. 307, 318) and on April 30, 1946, the latest date shown in the record, it was $10,058,430 (R. 245). There is,

of course, nothing "amazing" about such a reduction.

Judge IGOE unquestionably referred to the very much larger reduction (from $26,571,639 to $10,058,430) which, as shown in one of the appellee's exhibits (R. 245), took place between December 31, 1939 and April 30, 1946, and most of which took place prior to the extensive discussions of the subject of the reduction of the equipment obligations in the Commission's reports of January 3, 1944 and May 1, 1944, in the District Court's opinion of June 15, 1945,* in the briefs on the appeals relating to the approval of the plan and in the opinion of May 23, 1946 of the Circuit Court of Appeals.

(7) Elimination of Classes of Creditors.

The Court next said (R. 252):

> "Three classes of creditors set up in the original Plan have disappeared—the banks, the R. F. C., and the Peoria Railway Terminal Co."

Obviously, it adds nothing to say that classes of creditors have disappeared if their claims have been paid.

The reason why the claims of the banks have disappeared is that the injunction against the sale of their collateral was lifted (R. 247-8) and the collateral (in substantially larger face amount than the amount of the bank loans) was sold, so that in their shoes there now stand the holders of the First and Refunding Mortgage Bonds and the St. Paul & Kansas City Short Line First Mortgage Bonds, who bought them from the banks. The transfer of these pledged bonds to the present public holders obviously affords no basis for more favorable treatment of the holders of the Convertible Bonds.

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* In this opinion of the District Court approving the present plan of reorganization, the Court had discussed at length the contentions of the petitioners with respect to the effect of the reduction of equipment trust obligations by $13,000,000 between January 1, 1942 and January 1, 1944, and ruled against those contentions.

(8) Expenditures for Improvements.

The Court next referred to (R. 252)

> "the tremendous sums expended over the period on improvement of road and equipment".

The Court did not say what the sums were or over what period they had been expended.

This is another subject specifically covered by this Court's opinion *in Reconstruction Finance Corporation* v. *Denver & Rio Grande Western Railroad Company* (1946), 328 U. S. 495, 514-515:

> "Earnings during the trusteeship were used to improve the debtor railroad. When the vote was taken in 1944, the real estate and equipment account showed charges of $43,291,513 during the trusteeship. An estimated ten million of it was between the Commission's approval of the plan, June, 1943, and the Commission's certification on July 15, 1944, to the court of the vote by claimants. See 254 Inters Com Rep (F) at 354 and 382 for explanation of new equipment program to meet the war situation. The retirements are said by the respondent trustee to have been about $13,000,000, leaving a net addition to capital account of $30,000,000. Respondents urge that since capitalization was not substantially increased by the Commission between 1938, when the first draft of a plan came from the Commission's staff, and 1943, the junior creditors got little or nothing for this investment. The improvements may have been wise or unwise. That question is not before us. Railroads even in reorganizations must make additions to take care of public needs or to lower operating costs. See 62 F Supp 389. The senior bond interest continued to accumulate during this period. As the capitalization was not increased pari passu with the purchases, the holders of junior securities received less participation. The Commission did not consider that the earning prospect justified a greater capitalization than the one

> given and we think its judgment controls the valuation."
>
> • • • •

It is fair to say, therefore, that under this Court's rulings in *Reconstruction Finance Corporation* v. *Denver & Rio Grande Railroad Co.* (1946), 328 U. S. 495, there was no evidence to support the failure to confirm the plan. On the contrary, every ground urged by any of the objectors to the plan or mentioned by Judge Igoe in his opinion was specifically and clearly covered by an explicit ruling in this Court's opinion in the *Denver & Rio Grande* case. Therefore the following statement by this Court in the *Denver* case is just as applicable in the present case (328 U. S. at p. 535):

> "If a plan gives fair and equitable treatment to dissenters, the elements which make the plan fair and equitable cannot be the basis for a reasonably justified rejection. If only those elements are relied upon, as here, the rejection is not reasonably justified."

It can also be said that every point was considered by the Circuit Court of Appeals in its opinion and disposed of in conformity with the rules so laid down by this Court (R. 332-333, 343).

IV.

THE PLAN IS NOT INEQUITABLE TO THE HOLDERS OF THE JUNIOR SECURITIES.

On the argument in *Insurance Group Committee* v. *Denver & R. G. W. R. Co.* (1947), 329 U. S. 811, tables of market prices of "when issued" securities were submitted to the Court to show that the market values of the securities distributable under the plan to the secured creditors were much less than the amounts of their claims.

A similar table was submitted in the present case on the argument of the appeals in the Circuit Court of Appeals on January 30, 1947, as follows:

"Table of Market Prices of 'When Issued' Securities Allotted Under the Plan to Secured Creditors.

Issue	Amt. of Claim Jan. 1, 1947*	Market Price of Allotment of 'When Issued' Securities Jan. 22, 1947**	Percentage of Claim Satisfied by Allotment†
Gen. Mtge. Bonds...	$1331	$923	69
First & Ref. Mtge. Bonds	1438	580	40
Sec. 4½% Bonds ...	1496	653	44
C. O. & G. Bonds ...	1509	906	60
St. P. & K. C. S. L. Bonds	1538	489	32
R. I. A. L. Bonds ...	1504	622	41
B. C. R. & N. Bonds	1631	397	24
L. R. & H. S. W. Bonds	504	364	72

*The amount of each claim as of January 1, 1947 is calculated from Exhibit A at the front of the Commission's submission pamphlet which is R-35 on appeals Nos. 9247, 9270, 9271, 9272. In each instance the cash distribution made in October 1945 has been treated as applied in reduction of accrued interest and interest from January 1, 1944 to January 1, 1947 has been added. In the case of the Little Rock & Hot Springs Western First Mortgage Bonds the principal amount of the claim has been treated as $397.90. (See Exhibit A, R-10, and also R-10, p. 259.)

**The allotments of new securities are set forth in Exhibit A at the front of the Commission's pamphlet referred to in the preceding footnote. The market prices are taken from the Wall Street Journal of January 23, 1947 and represent the average of the bid and asked prices. They are as follows:

First Mortgage Bonds	105
Income Bonds	85½
Preferred Stock	64½
Common Stock	28½

†The figures in this column somewhat overstate the extent to which the claims are to be paid on the basis of current 'when issued' prices. A purchaser of 'when issued' income bonds, preferred stock and common stock would not have to pay the seller for them until the plan was consummated and those securities were delivered to the purchaser; when the securities were delivered, the purchaser would receive interest on the income bonds from January 1, 1944 and dividends on the preferred stock from the same date and any dividends payable on the common stock; and the purchaser would not have to pay any interest on the purchase price of the securities from the date of the contract or purchase to the date of delivery. Since interest has been computed only to January 1, 1947 in the above table, the effect of the table is to omit any provision for interest from January 1, 1947 to the date of the consummation of the plan on so much of the claims as would be provided for in income bonds, preferred stock and common stock. A purchaser would have to pay interest on the new first mortgage bonds from January 1, 1944 to the date of delivery of the bonds."

The present "when issued" prices for the new securities (Wall Street Journal of August 5, 1947) are below those of January 23, 1947.

Testimony with respect to the probable maximum future prices of the securities allotted to the holders of the General Mortgage Bonds was given at the hearing before the Interstate Commerce Commission in September, 1943, with a view to establishing that the allotment was inadequate (257 I. C. C. 265, 278). No testimony has ever been given that there is any likelihood that the holders of those Bonds or of any other class of bonds will receive under the plan securities on which they can hope to realize in the foreseeable future an amount in excess of their claims. There were three opportunities to give such testimony: before the Interstate Commerce Commission, at the Court hearing on the approval of the plan, and at the hearing on the confirmation of the plan. No effort was made to show that the plan could actually operate to enrich the secured creditors.

V.

THE DISTRICT COURT DID NOT HAVE UNREVIEWABLE "DISCRETIONARY" POWER TO REFUSE TO CONFIRM THE PLAN.

The only distinction—not a real difference—between this case and *Reconstruction Finance Corporation* v. *Denver & Rio Grande Railroad Co.* (1946), 328 U. S. 495, is that the District Court confirmed the *Denver & Rio Grande* plan and was reversed by the Circuit Court of Appeals, whereas the District Court refused to confirm the Rock Island plan and was directed to do so by the Circuit Court of Appeals.

A principal argument in the Court below, and *the* principal argument made by the petitioners, is that under Sec-

tion 77(e) the District Court had what is called a "discretionary" power to confirm the plan or to remand it to the Interstate Commerce Commission.

A District Judge who administers a case has no personal prerogative to determine the fate of a plan of reorganization which the Commission has approved. Both the public and the security holders are entitled to a judicial decision on the law and the record. If the District Court's power may be said to be "discretionary" in any sense, it calls for the exercise of a "judicial" discretion circumscribed by the rules laid down by this Court in its opinion in the *Denver* case.

The petitioners attempt to discard this Court's interpretation of the pertinent provisions of subsection (e) of Section 77 and rely upon single words in the statute which reads:

> "Upon receipt of such certification, the judge shall confirm the plan if satisfied that it has been accepted by or on behalf of creditors of each class to which submission is required under this subsection. * * * *Provided,* That, if the plan has not been so accepted by the creditors and stockholders, the judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it; that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and that the plan, conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (3). * * * If the judge shall confirm the plan, he shall enter an order and file an opinion with a statement of his conclusions and his reasons therefor. If the judge shall not confirm the plan, he shall file an opinion, with a statement of his conclusions and his reasons therefor, and enter an order in which he shall either dismiss the proceedings, or, in his

> discretion and on the motion of any party in interest, refer the case back to the Commission for further proceedings including the consideration of modifications of the plan or the proposal new plans. In the event of such a reference back to the Commission, the proceedings with respect to any modified or new plan shall be governed by the provisions of this section in like manner as in an original proceeding hereunder."

Several of the petitioners emphasize that the proviso just quoted—to which they refer as the "cram-down" provision in the hope that that name will make it seem extraordinary and unpalatable—uses the word "satisfied." They argue that, since a District Judge must be "satisfied" in order to confirm a plan, he should refuse to confirm a plan if he has any doubt whatever on any issue before him. But the same word "satisfied" is used in the provision of subsection (e) pertaining to the initial approval of a plan by a Judge. This Court's opinions in the *Western Pacific* and *Milwaukee* cases establish that when a District Court is asked to approve a plan which has been approved by the Commission, it should give the benefit of any doubt to the Commission-approved plan. And the *Denver* opinion shows that the same rule applies when an application is made for confirmation.

Another word relied upon by the petitioners is "may", as contrasted with the word "shall" in the provision of subsection (e) relating to the approval of a plan. It is perfectly clear from this Court's decision in *Reconstruction Finance Corporation* v. *Denver & Rio Grande Western Railroad Co.* (1946), 328 U. S. 495, that no significance can be attributed to the use of the word "may" rather than the word "shall". In the *Denver* opinion this Court laid down the rules which govern when an application for confirmation is made after the rejection of a plan by one or more classes of securityholders. If those rules govern, it makes no difference whether the statute uses the word

"may" or the word "shall" and it does not add anything to refer to the Court's power as "discretionary".

Certain of the petitioners imply that the sentence which prescribes when the Judge shall confirm a plan uses the word "discretion." It does not. The word "discretion" is used only in the sentence which says what a Judge may do *after* he has decided not to confirm a plan. There is thus no statutory provision that the Judge shall have "discretion" whether or not to confirm a plan. If anything, the use of the word "discretion" in the statutory provision relating to what shall be done *after* the Judge has decided not to confirm a plan would indicate that the Judge does not have a "discretion" whether to confirm a plan or not.

At any rate, application of the principles laid down by this Court in the *Denver* case to the facts in the record of the present proceeding demonstrates that the refusal to confirm was without warrant or rational basis and would therefore be an abuse of any discretion vested in the District Court.

The petitioners' principal reliance is on the circumstance that in the *Denver* case the District Court confirmed the plan and that in reinstating the District Court's decision this Court spoke of the "District Judge's familiarity with the reorganization." *Reconstruction Finance Corporation* v. *Denver & Rio Grande Western Railroad Co.* (1946), 328 U. S. 495, 533.

Certainly if a District Judge decides the issues relating to either the approval or the confirmation of a plan of reorganization and it appears that his decision results from an application of the law to the facts in the record, any appellate court may be expected to consider his "familiarity with the reorganization" as a factor in determining whether or not to sustain his decision. "Familiarity with the reorganization" may be an important

aid in reaching a correct decision of the issues in a reorganization proceeding.

But the fundamental requirement is a realization that the issues in a reorganization should be decided in conformity with the law. If that fundamental requirement is lacking, "familiarity with the reorganization" means nothing. In the present case, the District Court did not even purport to apply the applicable principles of the *Denver* case to the facts before it, but proceeded in a manner directly inconsistent with those principles. Also, in the present case, no matter involving any particular "familiarity with the reorganization" was involved. The only issue before the District Court on the confirmation was whether there had been such a change of conditions since the approval of the plan that the plan which was "fair and equitable" when approved was no longer "fair and equitable." The facts were clear that there had been no such change of conditions in that period of one year and the District Court cited none.

The petitioners' arguments could not in any event survive an analysis of the provision of subsection (e) of Section 77 which reads:

> *"If the judge shall not confirm the plan, he shall file an opinion, with a statement of his conclusions and his reasons therefor,* and enter an order in which he shall either dismiss the proceedings, or, in his discretion and on the motion of any party in interest, refer the case back to the Commission for further proceedings, including the consideration of modifications of the plan or the proposal of new plans."

This provision does not call for mere findings such as the District Court incorporated in the order appealed from (R. 241-242). Findings of that character are referred to in the statute as "conclusions". The statute also calls

expressly for a statement of the District Court's "reasons" for his failure to confirm the plan.

Clearly one purpose of the requirement of subsection (e) of Section 77 that the District Court state its "reasons" for its decision was in order to permit an adequate review of the decision. This requirement of Section 77 for a statement of "reasons" for refusal to confirm, is not unique. Under subsection (e), if the judge "shall not approve the plan, he shall file an opinion, stating his conclusions and the reasons therefor". So also under the same subsection, if "the judge shall approve the plan, he shall file an opinion, stating his conclusions and the reasons therefor". One obvious purpose in each instance was to have adequate statements of the "reasons" for the Court's actions in order to permit a proper review.

It would be the height of absurdity to say that, when the statute requires a statement of "reasons" to support "conclusions," a statement of "reasons" which does not afford the slightest legal basis for the "conclusions" can sustain an order which purports to rest on such "conclusions."

VI.

THE CIRCUIT COURT OF APPEALS HAD JURISDICTION TO REVIEW THE DISTRICT COURT'S ORDER AND HAD POWER TO DIRECT THAT THE PLAN BE CONFIRMED.

The Preferred Stock Committee and Axelrod *et al.* contend that the Circuit Court of Appeals had no jurisdiction to review the District Court's refusal to confirm the Plan. The Debtor in its petition does not advance that contention.

Section 24(a) of the Bankruptcy Act (11 U. S. C., Sec. 47 (a)) expressly vested the Circuit Court of Appeals with appellate jurisdiction

> "in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise or reverse, both in matters of law and in matters of fact; * * *."

That statute, as the Circuit Court of Appeals necessarily held, gave it jurisdiction to hear the appeals from the order denying confirmation entered in a proceeding under Section 77 of the Bankruptcy Act.

However, the Preferred Stock Committee makes the contention (pp. 13-15) that Section 77(f) of the Bankruptcy Act evidences an intention that no appeal be allowed in Section 77 proceedings except from an order confirming a plan. Its argument is built on the provision of Section 77(f) that, upon confirmation, the plan shall be binding "subject to the right of judicial review." The claim is that the quoted words are a grant of a right to appeal from a confirmation order, and that such a grant would impliedly preclude appellate review of any other Section 77 order of the District Court. The argument is wholly fallacious.

In the first place, the express grant of appellate jurisdiction contained in Section 24(a) of the Bankruptcy Act could not be nullified in other provisons of the Bankruptcy Act except by language clearly inconsistent with Section 24(a). There is no inconsistency between Section 24(a) and the above quoted language in Section 77(f). Furthermore, Section 77(f) is not the grant of a right to appeal from confirmation, as the Preferred Stock Committee contends. The words "subject to the right of judicial review" would hardly be used as an affirmative grant of a right to appeal. These words are a mere statement of a condition as to the binding effect of an order of confirmation. This condition necessarily had to be inserted in the provision which makes the confirmation order as final and binding as possible. But the right of review referred to in the

condition is necessarily that granted by Section 24(a) relating to bankruptcy proceedings in general.

If the Preferred Stock Committee's contention were sound, then the Circuit Courts of Appeals would not have had jurisdiction in all the many cases in which they have reviewed Section 77 orders other than confirmation orders. In fact the Circuit Court of Appeals below would not have had jurisdiction of the appeals which the petitioners themselves took in 1946 from the District Court's order approving the reorganization plan.

Then the Preferred Stock Committee (p. 15) cites *Gilbert* v. *Securities and Exchange Commission*, 146 F. 2d 513 (C. C. A. 7, 1945) as inconsistent with the Circuit Court of Appeals having had jurisdiction in the present case. The *Gilbert* case is not in point. The appeal there was taken under the Public Utility Holding Company Act and not the Bankruptcy Act. The appeal was from an order of the Securities and Exchange Commission recommending a reorganization plan to the District Court. The Circuit Court of Appeals merely held that the District Court should first act on the recommended plan before the matter came to the Circuit Court of Appeals.

The Preferred Stock Committee also makes the rather frivolous contention that the rights of the appealing creditors were not affected by the order refusing to confirm and that they therefore had no right to appeal from the order denying confirmation. The lack of substance in that contention is demonstrated by the fact that this Court took jurisdiction in the *Denver and Rio Grande Western* case, 328 U. S. 495, of an appeal by creditors from a Circuit Court of Appeals order reversing an order of confirmation and remanding the proceeding to the Interstate Commerce Commission. On this point the Preferred Stock Committee (p. 21) cites *Knight* v. *Wertheim & Co.* (C. C. A. 2, 1946), 158 F. 2d 838. But that case did not involve the ques-

tion of a right to appeal. The question there was as to the effect of an alteration of a plan which would give creditors payment in cash in full. The Circuit Court of Appeals held that the creditors would not be adversely affected by such an alteration. Such a holding can have no possible bearing in the present situation.

Axelrod *et al.* also argues (p. 4) that review by the Circuit Court of Appeals was a denial of "due process," but such an argument needs no comment.

The contention is made by the Preferred Stock Committee and Axelrod *et al.* that even if the Circuit Court of Appeals had jurisdiction, it did not have power to direct the District Court to confirm. The contention has no substance. It is clear that on an appeal in bankruptcy the Circuit Court of Appeals has jurisdiction to determine the merits of the case.

Bankruptcy Act, Section 24(a), 11 U. S. C., Sec. 47(a);
Schieber v. *Hamre* (C. C. A. 8, 1926), 10 F. (2d) 119;
In re Marshall (C. C. A. 2, 1931), 47 F. (2d) 209;
In re Gustav Schaefer Co. (C. C. A. 6, 1939), 103 F. (2d) 237.

As already mentioned, Section 24(a) of the Bankruptcy Act gives the Appellate Court in bankruptcy proceedings the power "to review, affirm, revise or reverse, both in matters of law and in matters of fact".

In *In Re Gustav Schaefer Co., supra*, the Court said (p. 242):

> "Upon an appeal in equity or bankruptcy, the appellate court will dispose of the case if the entire record is before it. Elliott v. Toeppner, 187 U. S. 327, 333, 23 S. Ct. 133, 47 L. Ed. 200; Houghton v. Burden, 228 U. S. 161, 172, 33 S. Ct. 491, 57 L. Ed. 780; Courier-Journal Job-Printing Company v.

> Schaefer-Meyer Brewing Company, 6 Cir., 101 F. 699; Schieber v. Hamre, 8 Cir., 10 F. 2d 119. The record here is complete and we may make final disposition rather than remand for further hearing."

As already stated, the entire court day of January 30, 1947 was devoted to the argument of the two groups of Rock Island appeals heard that day. Much the greatest part of the day was devoted to the appeals relating to the confirmation of the plan. The opinion of the Circuit Court of Appeals is the best answer to any criticisms of the adequacy of that Court's consideration of the questions argued before it (R. 332-343).

VII.

PETITIONERS HAVE NO SUBSTANTIAL INTEREST IN THE CASE.

The Circuit Court of Appeals permitted all of the petitioners to file briefs and argue on both the appeals relating to the approval of the plan and the appeals relating to its confirmation. On the appeals relating to the approval, the Court said (157 F. (2d) 241, 245):

> "The debtor seeks nothing for itself. It is in the anomalous but commendable position of arguing for others. The debtor, appropriately, does not question the valuations of the Commission."

Similarly, in the two *Denver & Rio Grande* cases, this Court permitted the Debtor to be heard.

However, the Debtor is actually the spokesman for the stockholders and the Preferred Stock Committee is a spokesman for some of the stockholders. The approval of the plan by the District Court, the affirmance of that approval by the Circuit Court of Appeals, and this Court's denial of the petition for writs of certiorari establish that the stockholders have no right to participate in the plan and it was not submitted to them for acceptance or rejec-

tion. On the motion for confirmation, the only issue was whether the classes of creditors who had not voted to accept the plan were reasonably justified in failing to accept. In these circumstances, the confirmation proceedings did not affect the old stockholders, and neither the Debtor nor the Preferred Stock Committee had any standing to object to confirmation of the plan after its submission to creditors or to seek review in this Court of the order directing confirmation. In the *Denver* case, 328 U. S. at page 520, this Court ruled that a stockholder had no standing to object to a provision of the plan only affecting creditors since the stockholder was eliminated under the reorganization plan. This Court said (p. 520):

> "It would also follow that the objection of a stockholder, the Missouri Pacific Railroad Company, through its Trustee in reorganization, to a voting trust for future control of the debtor would be ineffective because this stockholder is eliminated from the reorganization by the valuation of the property and allocation of securities."

Gerald Axelrod *et al.* call themselves "The Convertible Bondholders Group." They say that they are the "sole spokesmen" for the $32,228,000 of Convertible Bonds (p. 2). They have no authority to speak except for the bonds which they own. They do not state how many they own. When last disclosed the amount was comparatively inconsequential. The Trustee named in the Indenture under which the Convertible Bonds were issued, The Chase National Bank of the City of New York, was represented at the hearing in the District Court, and its counsel argued on behalf of the Convertible Bonds Trustee in the Circuit Court of Appeals.

If the plan were unfair or inequitable, the circumstance that Gerald Axelrod, *et al.* own but a small fraction of the most junior bond issue of the Rock Island

System would not have any legal significance. *Case* v. *Los Angeles Lumber Products Co.* (1939), 308 U. S. 106, 114-115. However, this Court will not be unmindful that the very large number of bondholders who voted to accept the Commission's plan (94.89% to 98.17% of the secured creditors in each class who voted, except one very small mortgage bond issue which has not objected to confirmation) would be injured by any unnecessary delay in concluding a reorganization proceeding which has already been pending for over fourteen years.

CONCLUSION.

This Section 77 reorganization proceeding has been pending since 1933. In 1944 the Commission certified to the Court the present modified plan of reorganization which the District Court approved in 1945. The Circuit Court of Appeals affirmed such approval in 1946 and this Court denied petitions for certiorari.

Within a few weeks after the Circuit Court of Appeals affirmed the approval of the plan, the District Court in June, 1946, refused to confirm the plan although, in the year which had elapsed since the District Court's approval of the plan, there clearly had been no change of conditions calling for revision of the plan. The District Court's action accordingly was in conflict with the principles laid down in this Court's opinions in the *Denver & Rio Grande Western* case. The District Court's refusal to confirm was reviewable by the Circuit Court of Appeals under Section 24(a) of the Bankruptcy Act, which grants it complete appellate jurisdiction of bankruptcy proceedings and controversies, whether interlocutory or final. No question is presented by petitioners warranting review by this Court of the action of the Circuit Court of Appeals in applying, to the facts of the present case, the principles laid down by this Court in the *Denver & Rio Grande Western* case.

IT IS RESPECTFULLY SUBMITTED THAT THE PETITIONS FOR CERTIORARI SHOULD BE DENIED.

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August 8, 1947.

FILE COPY

FILED

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1947

No. 178-183

IN THE MATTER OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, *Debtor.*

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, Etc., Et Al., *Petitioners,*
vs.
J. HAMILTON CHESTON, Et Al., Etc., *Respondents.*
No. 9203

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, Etc., Et Al., *Petitioners,*
vs.
METROPOLITAN LIFE INSURANCE COMPANY, *Respondent.*
No. 9204

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, Etc., Et Al., *Petitioners,*
vs.
CENTRAL HANOVER BANK AND TRUST COMPANY, Et Al., as Trustees, Etc., *Respondents,*
No. 9205

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, Etc., Et Al., *Petitioners,*
vs.
THE NATIONAL CITY BANK OF NEW YORK, as Trustee, Etc., *Respondent.*
No. 9206

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, Etc., Et Al., *Petitioners,*
vs.
JOHN C. TRAPHAGEN, Et Al., Etc., *Respondents.*
No. 9207

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, Etc., Et Al., *Petitioners,*
vs.
JAMES G. BLAINE, Et Al., Etc., *Respondents.*
No. 9208

REPLY BRIEF OF THE PROTECTIVE COMMITTEE FOR THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY 7% AND 6% PREFERRED STOCK.

CARTER H. HARRISON, Jr., et al.,
as the Protective Committee for The Chicago, Rock Island and Pacific Railway Company 7% and 6% Preferred Stock.

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IN THE

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No. 9208

REPLY BRIEF OF THE PROTECTIVE COMMITTEE FOR THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY 7% AND 6% PREFERRED STOCK.

Carter H. Harrison, Jr., Et. Al., as The Protective Committee for the Chicago, Rock Island and Pacific Railway Company 7% and 6% Preferred Stock, in reply to some of the assertions, arguments and points of the Respondents' Brief, respectfully represent to the Court:

I.

On page 44 of their brief in opposition to the petition for Writ of Certiorari, Respondents say:

> "Clearly one purpose of the requirement of Subsection (e) of Section 77, that the District Court state its 'reasons' for its decision was in order to permit an adequate review of the decision. This requirement of Section 77 for a statement of 'reasons' for refusal to confirm is not unique. Under Subsection (e), if the judge 'shall not approve the plan he shall file an opinion stating his conclusions and reasons therefor'. So, also, under the same Subsection, if 'the judge shall approve the plan, he shall file an opinion stating his conclusions and the reasons therefor.' One obvious purpose in each instance was to have adequate statements of the 'reasons' for the court's action in order to permit a proper review.
>
> "It would be the height of absurdity to say that when the statute requires a statement of 'reasons' to support 'conclusions' a statement of 'reasons' which does not afford the slightest legal basis for the 'conclusions' can sustain an order which purports to rest on such 'conclusions'.

Subsection (e), at the end of the next-to-the-last paragraph, provides:

> "If the judge shall not confirm the plan he shall file an opinion with a statement of his conclusions and his reasons therefor, and enter an order in which he shall either dismiss the proceedings or, in his discretion, and on the motion of any party in interest, *refer the case back to the Commission* for further proceedings, including the consideration or modifications of the plan or the proposal of new plans." (Italics ours)

It is very apparent that where the judge refuses to confirm the plan and refers the case back to the Commission for further proceedings the sole purpose of the Congress in requiring the judge to file an opinion with a statement

of his conclusions and his reasons therefor was to enable the Commission, when it had the case back before it for further proceedings, to have the benefit of the judge's opinion, his statement of his conclusions and his reasons therefor, in refusing to confirm the plan. Since there is no right of appeal from the order of the District Court in refusing to confirm a plan of reorganization under Section 77 (but only from an order confirming a plan), it could not have been the intent of the Congress that the purpose of requiring the District judge to file an opinion with a statement of his conclusions and his reasons therefor was to permit a review by an Appellate Court of the Court's action in refusing to confirm a plan of reorganization.

Since the filing of the petition for Writ of Certiorari in this case, the Committee on the Judiciary of the House of Representatives of the United States, on July 15, 1947, favorably reported HR 3980, with the recommendation that said Bill, with certain clarifying amendments, do pass (Report No. 923, Eightieth Congress, First Session). In that report a statement of intent of the Congress, that no appeal lies from an order of the District judge refusing to confirm a plan of reorganization, is forcefully stated at page 8 of the aforesaid H. Report 923, namely:

> "In the Rock Island case the plan was rejected by an overwhelming large vote by those holders of Convertible Bonds who voted thereon (the Convertible Bonds were issued in the aggregate total principal amount of about $32,000,000.00 in 1930 with the approval of the Commission).
>
> "The District Judge found that the Rock Island plan had *not* been accepted by or on behalf of this class of creditors to which submission was required under the statute. Moreover, he did *not* find that he was satisfied that the plan made 'adequate provision for fair and equitable treatment for the interests or claims' of those bondholders who rejected it, or that such rejection was not 'reasonably justified'. He found

exactly the opposite as to each of these prerequisites to confirmation. Accordingly, the District Judge refused to confirm the plan and (pursuant to the statute) filed his opinion with his statement of his conclusions and reasons therefor and entered an order referring the case back to the Commission 'for further proceedings, including the consideration of modifications of the plan or the proposal of new plans.''

''However, the Circuit Court of Appeals held in effect on the appeals from that order that the District judge had no power under the statute to refuse to confirm a rejected plan *unless* the classes of creditors who rejected it had affirmatively established that their rejection thereof was reasonably justified. No such requirement was written into the statute, nor does any basis appear for construing any such intent by Congress. The discretionary power granted by the statute to the District Judge to overrule the rejection of the plan by any class of security holders to which submission was required was intended to be exercised only 'if he'—i.e., the District Judge—'is satisfied and finds after hearing that it makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it' etc. The opinion of the Circuit Court of Appeals appears to be a clear misconstruction of the quoted provisions of Subsection (e).''[1]

II.

The intent of Congress was to preserve railroads for their ownership.

In H. Report 923, Eightieth Congress, First Session, the Committee on the Judiciary of the House of Representatives of the United States, on page 1, said:

''H.R. 3980 concerns itself with both present and future railroad financial reorganization. It is an im-

[1] A substantially identical Bill (S. 249, with amendments) was favorably reported by the Committee on Interstate and Foreign Commerce of the United States Senate on July 3, 1947 (Senate Report No. 432, Eightieth Congress, First Session).

mediate outgrowth of legislation passed at the close of the Seventy-ninth Congress (S. 1253) and subsequently pocket-vetoed by the President, that the present Congress reenact such legislation 'with certain modifications' to meet his views. The need for the reforms embodied in this and predecessor bills arises from two main circumstances: the incredible muddle of the proceedings under Section 77 of the Bankruptcy Act and the growth of the forfeiture doctrine as expounded and effectuated in those proceedings. The cumbersome and lethal procedure resulting from this construction of 'An Act For The Relief of Debtors' has caused wide-spread and shocking extinguishment of investments in those carriers already exceeding a billion dollars, and if unchecked they will finally exceed two billion dollars."

And at page 2 of said Report:

"Although all these laws were intended by Congress for the preservation of our railroads and their ownership, the theory has appeared to prevail that the capitalization of companies in Section 77 proceedings should in all cases be drastically reduced. That is what has been done consistently and persistently.

"*This tragic, unintended consequence of a law enacted for the relief of depression-stricken debtor railroads* resulted primarily from the Interstate Commerce Commission's construing and applying the statute in such a manner as to make its estimate of future earnings of the roads the controlling factor in determining their limits of permissible capitalization. Such forecasts of earnings were made in 1939 and 1940 in the case of practically all railroad reorganizations, and necessarily (and in some cases expressly) those estimates were based largely on a consideration of the income during depression years. Thereafter, the Commission persistently held to its original determinations of the limits of capitalization it proposed for these railroads, despite the fact that radical economic and financial improvement during the subsequent years made such restricted capitalizations, and the conse-

quent elimination of certain junior bondholders and all stockholders, patently indefensible.'"[2] (Italics ours)

Apropos of what the Commission said in the Missouri Pacific Railway Company, Debtor, case, "the Commission has consistently refrained from volunteering its views on new or changed conditions," in H. Report 923, at page 7, appears the following:

> "In a kind of Alphonse and Gaston act, the Court and the Commission have been bowing to each other and saying 'you first' on the question of revision of plans. The Commission has taken the position that once it has certified a plan to the court, its responsibility ends until and unless the court refers the plan back to it for further proceedings. The Commission has steadfastly held to the view that inasmuch as it was not so directed by Section 77 (that statute being silent on the matter) it should not request or even suggest to the court that a plan once approved and certified to the court should be referred back to the Commission for reexamination in the light of changed conditions. And this has remained true, regardless of how inequitable and outmoded the plan has become by reason of such changes. On the other hand the courts (including the Supreme Court) have persistently said that if there was substantial evidence in the record to support the plan, they will not disturb it. As a consequence

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[2] The memorandum brief of the Interstate Commerce Commission filed in the United States Circuit Court of Appeals for the 8th Circuit, Nos. 13367-73, Civil, *In the Matter of Missouri Pacific Railway Company, Debtor, Wright, Et Al., Etc.*, v. *Group of Institutional Investors, Etc., Et. Al.* (Consolidated Appeals), on page 2, states:

"Subsection (d) of Section 77 provides that if the Commission approves a plan it shall thereupon certify the plan to the Court, together with a transcript of the proceedings before it and a copy of the report and order approving the plan, thus *fulfilling its administrative function.* Thereafter all formal proceedings are before the courts: the views of the parties, their interpretation of any new data, and their effect upon the reorganization requirements, must be submitted to the courts. The *Commission has consistently refrained from volunteering its views on new or changed conditions.* At such point in the proceedings it has felt that the question whether conditions have so changed as to require resubmission of the plan to the Commission for revision *is primarily one for the District Court*, before which the facts may be presented and the matter argued." (Italics ours). (Copy of the Commission's brief is found in Reply Brief of Debtor-Petitioner, U.S.S. Ct., Oct. Term, 1947, Cases Nos. 184-189.)

of this doctrine of administrative conclusiveness, a plan, once approved and certified by the Commission, becomes endowed with fatal finality. Nothing (in the practical sense) can stop it. Even a virtually unanimous application by the parties directly affected is of no avail to recall it." (See St. Louis-Southwestern and Missouri Pacific cases, below.)

III.

The Commission and the Court, for the first time, departed from the "kind of Alphonse and Gaston act" in the Missouri Pacific Railway Company, Debtor, case.

On May 24, 1947, the United States Circuit Court of Appeals for the Eighth Circuit, in Nos. 13367-73, both inclusive, *Wright, et al* v. *Group of Institutional Investors, etc. et al.* (Missouri Pacific plan appeals) entered the following order:

> "—It is Further Ordered by the Court that appellants serve a copy of the record and of their brief or briefs on the Interstate Commerce Commission and the Trustee of the Missouri Pacific Railway Company.
>
> "The Interstate Commerce Commission and the Trustee are hereby requested, if so advised, to file briefs stating their views respecting the issued raised by the appeals within the time for filing briefs of appellees. If found necessary to do so, the Commission may apply for further extension of time for filing its brief—."

In compliance with the above order the Interstate Commerce Commission by its attorneys, Daniel W. Knolton, Chief Counsel, and Daniel H. Kunkel, Attorney, Washington, D. C., filed its memorandum brief with the United States Circuit Court of Appeals for the Eighth Circuit in The Matter of Missouri Pacific Railway Company, Debtor. (A copy of this memorandum brief is attached as Appendix B to the Brief of Debtor-Petitioner, Nos. 184-189,

In The Matter of The Chicago, Rock Island and Pacific Railway Company, Debtor, October Term, 1947, in the Supreme Court of the United States, and will not be repeated here.) Howeveer, said memorandum brief stated, among other things, that:

> "While the plan is sufficiently elastic to permit of adjustment for a reasonable amount of debt retirement and interest payment, it is questionable whether the possibilities of the large retirements and expenditures and further cash accumulations which have occurred were contemplated.
>
> "It is submitted that these problems arising out of the substantial changes in conditions since the approval of the plan justify its further review by the Commission.
>
> "There are additional reasons which make it desirable that the Commission give further consideration to the plan. * * For these reasons the Commission is of the opinion that the present plan should be returned to it for reconsideration and revision, and it so recommends."

On September 9, 1947, the United States Circuit Court of Appeals for the Eighth Circuit, in said Missouri Pacific Railway Company case, entered the following order:

> "The above entitled appeals having come on for further consideration on this 9th day of September, A. D. 1947, before the Court at the Federal Court Room in the City of St. Paul, Minnesota, and it appearing that all of the appellants and likewise all of the appellees in these appeals who have filed briefs urge that the plan of reorganization involved herein should be referred back to the Interstate Commerce Commission;
>
> "And it further appearing that in addition to the briefs filed on behalf of the appellants and on behalf of the appellees, the Interstate Commerce Commission has, pursuant to the suggestion of this Court that it state its views with respect to the issued raised by

these appeals, filed a brief in which said Commission suggests that certain problems arising out of the substantial changes in conditions since the approval of said plan require its further review by the Interstate Commerce Commission;

"And this Court having heard counsel for the parties and having duly considered the same, and being of the view that because of the substantial changed conditions which were not anticipated by the Commission, but have become apparent since the order approving said plan of reorganization was entered, that the order of the District Court approving said plan should be vacated and set aside, and said plan should be returned to the District Court, with directions to the District Court to return the plan to the Interstate Commerce Commission to take such further evidence and make such further recommendations as to it shall appear proper:

"It is Therefore Ordered, that said order of the District Court entered on January 22, 1946, approving said plan of reorganization (No. 2604-B) be and the same hereby is vacated and set aside, and that said cause be and it is hereby remanded to the District Court with directions to return the plan to the Interstate Commerce Commission for further investigation, consideration and recommendation * * *."

IV.

Facts which warrant this Court in requesting the Commission to file briefs stating its view with respect to the issues raised in the petition for Writ of Certiorari.

The problems arising out of the substantial changes in conditions since the approval of the plan of reorganization of The Chicago, Rock Island and Pacific Railway Company, debtor, likewise justify review of said plan by the Commission, in the same manner as sought by the Commission in its memorandum brief filed with the United States Circuit Court of Appeals for the Eighth Circuit in the

Missouri Pacific Company case, to which we have referred in the previous points. Typical comparisons follow.

At June 30, 1947, the Rock Island held $84,503,000 of cash and temporary cash investments. At the same date the Missouri Pacific System (Missouri Pacific Railroad, Gulf Coast Lines, and International Great Northern), held $71,538,000 of cash and temporary cash investments. Net current assets at that date were $82,733,000 for the Rock Island and $72,649,000 for the Missouri Pacific System.

Rock Island cash and temporary cash investments were 53% of 1946 operating revenues and 652% of 1946 fixed charges on the old capitalization. For the Missouri Pacific System the ratios were 30% and 309%, respectively.

If Rock Island were to reduce its cash and temporary cash investments to 30% of 1946 operating revenues as has been done by the Missouri Pacific System, $36-½ million would be available for additional reduction of claims, and the road would still have $48 million of cash and temporary cash investments. That amount would be equal to 370% of 1946 fixed charges on the old capitalization, or, stated otherwise, if the road did no better than to break even on operating expenses, taxes, and rents, then the cash on hand, after spending $36-½ million, would be sufficient to pay fixed charges on the old (i. e., present) capitalization for the next 3.7 years.

In its Memorandum Brief of August, 1947, to the Circuit Court of Appeals, the Interstate Commerce Commission gave as one reason why the Missouri Pacific plan should be reconsidered the fact that, since the Commission's issuance of the Missouri Pacific plan, that system had paid $46,380,000 principal amount of claims. This figure did not include all the Iron Mountain bonds set forth in the plan, nor did it include interest to the effective date of the plan. Including those items, the total claims of Missouri Pacific System completely eliminated

(not including partial reductions) since the issuance of the I.C.C. plan, has been $70,064,000, or 8.4% of the total existing claims of $83,390,000 at the time of the plan. As a result of these claim settlements, $56,873,000 of new securities were released, an amount equal to 10.1% of the proposed new capitalization of $560,480,000 (assuming reduction from approximately $640,000,000 by open market operations as proposed in the plan).

Since the present Rock Island reorganization plan was issued by the I.C.C., that road has settled $18,458,000 principal amount of debt and $9,333,000 of interest claims (RFC, $13,719,000 principal and $7,130,000 interest; bank loans, $3,811,000 principal and $2,203,000 interest; and Peoria Terminal bonds, $928,000 principal). Application of $36,500,000 of cash to additional reduction of claims, as suggested above, would bring the total amount of claims eliminated since the I.C.C. plan was issued to $64,291,000, or 11.2% of the total claims of $572,789,000 set forth in the I.C.C. plan. (This is without counting $34,279,750 paid to various creditors on account in 1945.)

Furthermore, in the Rock Island plan the interest claims are computed to January 1, 1944, whereas in the Missouri Pacific plan they are computed only to January 1, 1943.

As heretofore stated, the effective date of the Rock Island plan is January 1, 1944. In the years 1944, 1945 and 1946 Rock Island has made gross expenditures for additions and betterments to road and equipment of $45,658,000, equivalent to 8.8% of the $514,727,000 investment in transportation property at the end of 1946. This gross expenditure in these years is equivalent to 12.8% of the I.C.C., approved new capitalization.

In contrast, the Missouri Pacific System in the *four* years 1943-46 (the Missouri Pacific plan effective date is January 1, 1943), made gross expenditures of $53,030,000 for additions and betterments to road and equipment, an

amount equivalent to only 7.1% of the $743,319,000 investment in transportation property at December 31, 1946. This gross expenditure is equivalent to only 9.4% of the I.C.C. approved capitalization of $560,480,000 (and to only 8.3% of said initial capitalization of approximately $40,000,000).

Thus the Rock Island Railway, like the Missouri Railroad, since the approval of its plan of reorganization, has made extensive expenditures for improvements of the property which will affect the earning power of the Railroad, and in both cases there have been (a) debt retirement, (b) cash accumulations, and (c) payments on claims, which make adjustments necessary in the distribution of cash and new securities. These have caused a substantial disturbance of the attempted balanced relationship in the treatment provided for various classes of creditors in the plan approved by the Commission.

Furthermore, an examination of the Transcript of Record in this case, pages 208-213, and the Exhibits which appear (at pages 236 to 248, both inclusive) show very conclusively that in any year the earnings of the Rock Island are much larger than were ever anticipated by the Commission when it approved the plan and that for the year 1947 the earnings, based upon the present rate, will be almost twice those which the Commission considered normal and on which it based its plan. Already in 1946 the earnings were over fifty percent larger than the $11,000,000 estimated by the Commission as normal. At what point, in the progression of larger and larger earnings, does the original estimate of "normal" earnings by the Commission become obsolete? It is here contended that that point has long since been reached and passed; that the District Judge so recognized, and that, as ordered by the District Judge, it is now proper for the Commission to be given a chance to correct its patent and indefensible error in estimating

the earnings and earning power of the debtor. The Committee on the Judiciary, House of Representatives, said at page 9 of said House Report 923:

> "* * * these procedural involvements (of the Rock Island) are
>
> "Entirely aside from the glaring contradictions elsewhere referred to in this report, such as those cases where after three agencies of the Federal government (the Commission, the Bureau of Internal Revenue, and the courts) had declared an equity worthless the carrier subsequently earned and paid to the government on that equity income and excess profits taxes nearly equal to or greater than the full par value of the allegedly 'valueless' equity. (See Table H. Infra.)."

Table H discloses the following facts as to the Chicago, Rock Island and Pacific Railway Company, Debtor:

a. Principal of funded debt as of December 31, 1945, $293,097,800.00;

b. Net current assets as of December 31, 1936, $8,668,181.00;

c. Disbursed to creditors in principal and interest (January 1, 1938 through November 30, 1946), $108,828,685.00 (this figure includes $34,279,750.00 disbursed in 1945 without designation as to application to interest or principal);

d. Federal income and excess profits taxes paid during ten years ended December 31, 1946, $82,065,427.00;

e. Gross capital expenditure during ten years ended December 31, 1946, $115,605,000.00, or a total of $306,499,-112.00 paid to creditors in principal and interest, Federal income and excess profits taxes, and gross capital expenditures; and

f. Net current assets, December 31, 1946, $77,720,848.00.

At page 245, Transcript of Record, Exhibit No. 4, appears the total net capital expenditures for road and equipment, January 1, 1940 to April 30, 1946. This figure

is a total of $37,246,965.49. Exhibit 3 (R. 245) shows that the total amount of cash and cash equivalent as of March 31, 1946, was $82,272,199.08. Exhibit 2 (R. 245) shows that between January 1, 1940, and April 30, 1946, the total decrease of the Debtor's debt in the hands of the public was $25,411,598.97.

The following table shows the latest available earnings of the debtor as reported by Moody's Investors' Service, compared with the Commission's estimate:

	Balance Available For Fixed Charges*	Times Fixed Charges Earned on Basis of Existing Capitalization*	Earned Per Share On Existing Stock	
			Pfd.	Common
Commissions "normal" Est. (See p. 437 of F.D. 10028, printed, record)	$11,000,000	0.83	Nil	Nil
Actual 1946	20,969,190	1.62	$7.87	$0.98
12 Mos. to 7-31-47	25,169,059	1.83	9.90	2.37
7 Mos. to 7-31-47	15,355,366	1.89	7.78	2.91

* Before Federal income tax, and based on old capitalization less amounts paid off, as of December 31, 1946.

An examination of the exhibits (R. 236-248, both inclusive) shows the following further facts which have developed since the Commission approved the plan of reorganization of the Debtor (January 3, 1944, as modified and approved by the Commission on May 1, 1944, effective date January 1, 1944,) and which were not anticipated by the Commission. They constitute problems arising out of the substantial changes in conditions since the approval of the plan by the Commission, namely:

In the 7-year period 1940 through 1946, inclusive, The Chicago, Rock Island and Pacific Railway Company, Debtor:

a. Earned its fixed charges on the old capitalization an average of 2.61 times annually;

b. Earned a total amount of $70,818,000.00 on the stocks wiped out by the plan, or a sum equal to $130.00 per share on the Preferred stock and $62.68 per share on the Common stock;

c. Increased its net working capital by $67,105,327.00 and increased its cash items alone by $67,948,546.00 even after (1) paying Federal income and excise profits taxes of $82,065,427.00; (2) disbursing to creditors in principal and interest $108,828,685.00 (January 1, 1938 through November 30, 1946); and (3) making gross capital expenditures of $115,605,000.00 (10 years 1937-1946).

The earnings of the debtor for August 1947 and for the first eight months of 1947 are now available. Net earnings in August 1947, available for the payment of interest, were 25% greater than for the same month last year. The net earnings available for the payment of interest (before the deduction of taxes) for the first eight months of 1947 were $18,504,702, or at the annual rate of $27,757,056—more than two and one-half times the anticipated earnings of $11,000,000 upon which the plan was based—and more than twice the annual interest of $12,525,036 accruing on all the old indebtedness, including the convertible bonds, in satisfaction of which only 17% is to be paid under the plan.

Here are the official figures:

Earnings of Rock Island.

January 1 - August 31, 1947

Earnings (after deduction of depreciation, amortization, and federal income taxes, and before deduction of interest accrued but unpaid on the old bonds)	$ 14,584,702.00
Federal income taxes (added to earnings because taxes are deducted after bond interest has been paid)	3,920,000.00
Total earnings, for 8 month period, available for interest on bonds	18,504,702.00
1947 annual rate of earnings available for bond interest	$ 27,757,056.00

Interest on the old convertible bonds was earned more than 11½ times during the first eight months of this year, as shown by the following figures:

Earnings available for interest	$18,504,702.00
Interest on old bonds senior to convertibles	7,221,600.00
8 months' earnings available for interest on convertibles	11,283,102.00
8 months' interest on convertibles	$ 968,400.00

The 8 months' earnings available for interest on the convertibles is greatly in excess of the entire payment proposed in the plan for the full satisfaction of such convertibles.

In its Memorandum Brief on Missouri Pacific referred to above, the I.C.C. stated that the return of the Missouri Pacific plan would give it an opportunity of reviewing the provisions as to the selection of reorganization managers and of the first board of directors of the new company, and went on to say "The holdings of present securities of some

of the parties entitled under the plan to nominate appointees probably have materially decreased from their original holdings, notably in the case of the Institutional Group of Holders of Missouri Pacific First and Refunding Bonds. In the case of the Reconstruction Finance Corporation, whose loan has been satisfied, there will be an initial failure of appointment."

In the Rock Island plan five reorganization managers are to be appointed: one by the Protective Committee for the General 4s; one by the Protective Committee for the First & Refunding 4s and Secured 4½s; one by the Mortgage Trustees of the General 4s, First & Refunding 4s and Secured 4½s; one by the RFC and bank claimants, and one by the Protective Committee for the branch line bonds and the Trustee of the Convertible bonds. The Reorganization Managers are empowered to select the initial board of directors of the new company.

Since the Rock Island plan was written, the RFC and bank claims have been paid off, so that, in the language of the I.C.C., there would be "an initial failure of appointment," except that actually and what is worse these appointments are to be made by or on behalf of whose interest in the proceedings has vanished.

Thus, the Protective Committee for Rock Island First & Refunding 4s and Secured 4½s has been dissolved and the holders of deposited bonds have been requested to withdraw them from deposit with the Committee. The reorganization plan provides that in the event of termination of a Protective Committee the appointment of that Committee's reorganization manager should be made by the former chairman of the Committee, or, in case of his failure promptly to act, by a majority of the former members of such Committee. The Chairman of the Committee in question was Dwight S. Beebe of Mutual Life Insurance Company of New York. In 1932 his company owned

$5,200,000 of Rock Island First & Refunding 4s and Secured 4½s, but at the end of 1946 it owned no Rock Island bonds of any issue. The other members of the Committee were Stedman of the Prudential, Walker of the Northwestern Mutual, Hagerty of the Metropolitan, and M. P. Callaway, Bankruptcy Trustee of the Central of Georgia. In 1932 Northwestern Mutual held $4,806,000 of First & Refunding 4s and Secured 4½s, but at the end of 1946 it held only $500,000. Callaway apparently represents none of the bonds and presumably was named to the Committee at the time he was Trust Officer of the Guaranty Trust, a connection long since severed. The only member of the former Protective Committee whose company held any sizable amount of Rock Island bonds of these two issues at the end of 1946 is Hagerty of the Metropolitan, which held $9,258,000 of First & Refunding 4s and Secured 4½s at that time. Unless a change is made in the plan, the members of the former Protective Committee in question undoubtedly would defer to Hagerty's wishes, and, as a consequence, Metropolitan would select one of the Reorganization Managers by itself.

But, Alleghany Corporation, owning $17,315,000 of First & Refunding 4s and Secured 4½s, would have no voice in the naming of the Reorganization Manager to represent the two issues of bonds of which it is the largest reported holder.

WHEREFORE, Petitioners pray that their prayer contained in their petition for Writ of Certiorori be granted, that upon the issuance of the Writ of Certiorari this Court direct the petitioners and the respondents to serve upon the Interstate Commerce Commission and the Trustees of the Debtor a copy of each petition, brief in opposition to petition, and reply brief filed in this cause, and that the Interstate Commerce Commission and the Trustees of the Debtor be requested to file briefs with this Court stating

its and their views respecting issues raised by the petitioners and the respondents within a time to be fixed by this court.

Dated at Chicago, Illinois, October 2, 1947.

Respectfully submitted,

CARTER H. HARRISON, JR., Et. Al., as the Protective Committee for The Chicago, Rock Island and Pacific Railway Company 7% and 6% Preferred Stock,

By LOY N. MCINTOSH, Their Attorney
135 South LaSalle Street
Chicago, Illinois

GANN, SECORD, STEAD AND MCINTOSH
Of Counsel.

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IN THE

Supreme Court of the United States

October Term, 1947

No. 178-183

IN THE MATTER OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, *Debtor.*

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, Etc., Et Al., *Petitioners,*
vs.
J. HAMILTON CHESTON, Et Al., Etc., *Respondents.*
No. 9203

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, Etc., Et Al., *Petitioners,*
vs.
METROPOLITAN LIFE INSURANCE COMPANY, *Respondent.*
No. 9204

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, Etc., Et Al., *Petitioners,*
vs.
CENTRAL HANOVER BANK AND TRUST COMPANY, Et Al., as Trustees, Etc., *Respondents,*
No. 9205

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, Etc., Et Al., *Petitioners,*
vs.
THE NATIONAL CITY BANK OF NEW YORK, as Trustee, Etc., *Respondent.*
No. 9206

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, Etc., Et Al., *Petitioners,*
vs.
JOHN C. TRAPHAGEN, Et Al., Etc., *Respondents.*
No. 9207

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, Etc., Et Al., *Petitioners,*
vs.
JAMES G. BLAINE, Et Al., Etc., *Respondents.*
No. 9208

PETITION FOR REHEARING OF THE PROTECTIVE COMMITTEE FOR THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY 7% AND 6% PREFERRED STOCK.

CARTER H. HARRISON, Jr., et al.,
as the Protective Committee for The Chicago, Rock Island and Pacific Railway Company 7% and 6% Preferred Stock.

By LOY N. McINTOSH, Their Attorney
135 South LaSalle Street
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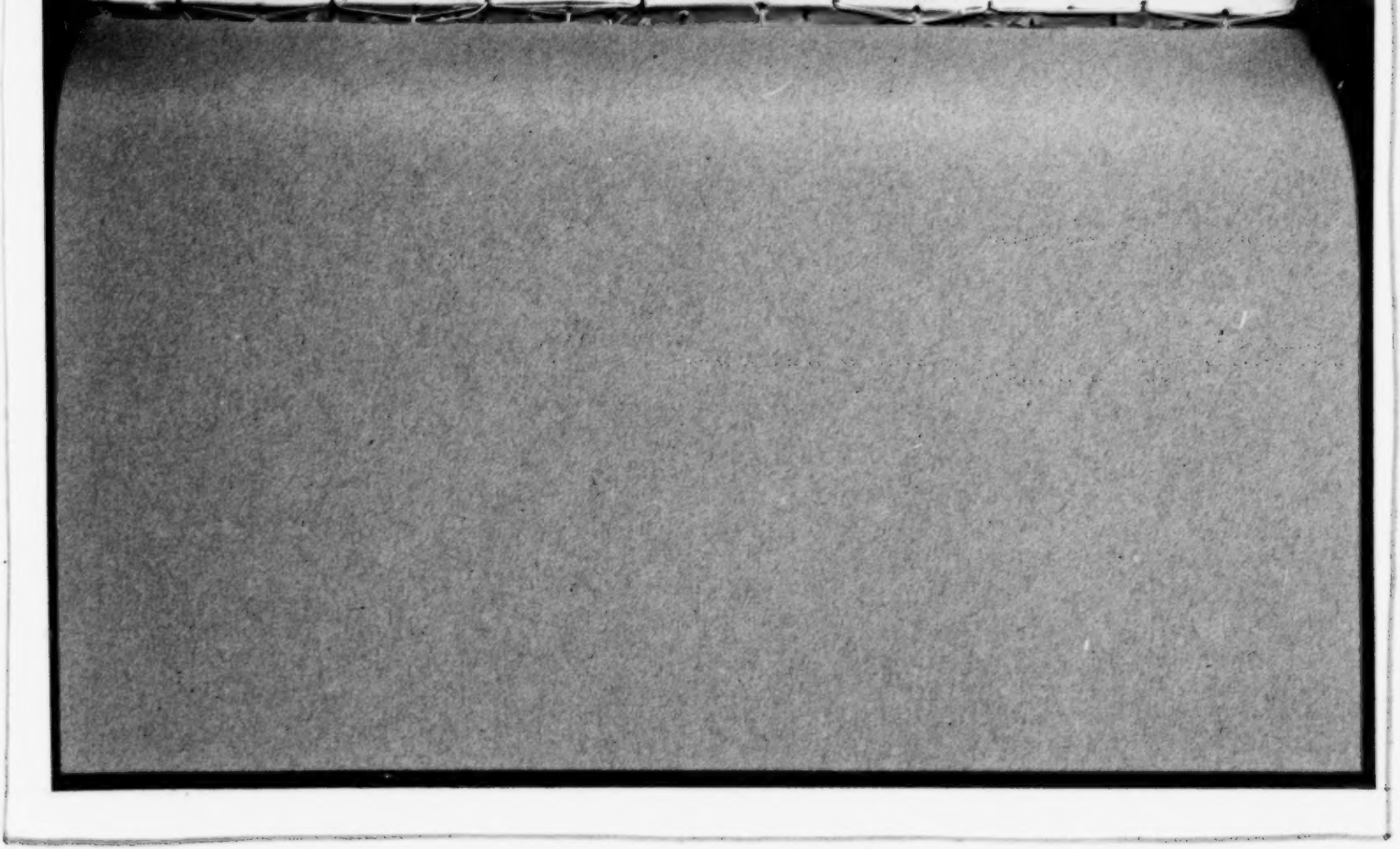
GANN SECORD STEAD
AND McINTOSH
Of Counsel

McCORMICK AND HENDERSON, INC., CHICAGO



IN THE

Supreme Court of the United States

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THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, Etc., Et Al., *Petitioners,*
vs.
THE NATIONAL CITY BANK OF NEW YORK, as Trustee, Etc., *Respondent.* } No. 9206

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, Etc., Et Al., *Petitioners,*
vs.
JOHN C. TRAPHAGEN, Et Al., Etc., *Respondents.* } No. 9207

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, Etc., Et Al., *Petitioners,*
vs.
JAMES G. BLAINE Et Al., Etc., *Respondents.* } No. 9208

PETITION FOR REHEARING OF THE PROTECTIVE COMMITTEE FOR THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY 7% AND 6% PREFERRED STOCK.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, CARTER H. HARRISON, JR., STEPHEN V. R. CROSBY, CHARLES F. GREY and GEORGE E. PIKE, as the Pro-

tective Committee for The Chicago, Rock Island and Pacific Railway Company 7% and 6% Preferred Stock, respectfully pray for a rehearing of petitioners' Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit in the above entitled cases, which petition for a writ of certiorari was denied by the Court on October 20, 1947; and as grounds for a rehearing your petitioners state:

This Court should reverse the order of the Circuit Court of Appeals for the Seventh Circuit and affirm the order of the District Court remanding the present plan of reorganization to the Commission for further proceedings, upon the general ground that the record discloses material changes in conditions affecting such plan, of a kind not envisaged or considered by the Commission in its formulation of that plan, and that in any event this Court should not conclude from the present record that the Commission did in fact envisage and consider such changes without first requesting the Commission to expressly inform the Court upon such matters.

It is respectfully submitted that this Court should not substitute its judgment, as to the effect of such changed conditions upon the plan, for that of the Interstate Commerce Commission—the expert body whose decisions, under previous rulings of this Court, are final if supported by substantial evidence. (*Eckers* v. *Western Pac. R.R. Co.* 318 U.S. 448; *Group of Institutional Investors* v. *Chicago, M. St. P. & P. R.R.* 318 U.S. 523.)

This Court has recognized the power of the courts to set aside a plan of reorganization, theretofore certified by the Commission, on account of subsequent changes in conditions of a kind not "envisaged and considered by the Commission in its deliberations upon or explanation of the plan". (*Reconstruction Finance Corporation* v. *Denver & R.G.W. R.R. Co.* 320 U.S. 495, 522.)

In the decision here sought to be reviewed, the Circuit Court of Appeals did recognize this principle, but held that material changes, which have occurred in the financial and economic affairs of the Rock Island since the Commission certified the plan on May 1, 1944, were in fact "envisaged and considered" by the Commission in its deliberations upon the plan and that such changes were "forseen and considered by the Commission in formulating the plan." (*Cheston et al.* v. *Chase National Bank as Trustee, et al.*, C.C.A. 7th Cir., January 1947 Session, Nos. 9203-8, Slip opinion, pages 10 and 11.)

In his concurring opinion, denying the writ of certiorari in this case, Mr. Justice Rutledge states that "The record in this case seems clearly to bear out those conclusions".

It is respectfully submitted that the conclusions of Mr. Justice Rutledge and of the Circuit Court of Appeals in this regard are clearly erroneous, for the reason that the record affirmatively shows that the Commission did not "envisage" or "consider" certain vital changes in conditions which have subsequently developed.

Probably the most significant of these changes is that of the earnings and the demonstrated earning power of the Rock Island. It appears throughout the reports of the Commission in this and other railroad reorganizations under Section 77 that earning power has been given *primary consideration* in the determination by the Commission of total permissable capitalization or total valuation of the debtor's properties. Indeed, subsection (e) of Section 77 was considered as expressly requiring such primary consideration of earning power, past, present and prospective.[1]

[1] Subsection (e) provides: If it shall be necessary to determine the value of any property for any purpose under this section the Commission shall determine such value and certify the same to the court in its report on the plan. The value of any property used in railroad operation shall be determined on a basis which will give due consideration to the earning power of the property, past, present, and prospective, and all other relevant facts. In determining such value only such effect shall be given to the present cost of reproduction new and less depreciation and original cost of the property and the actual investment therein as may be required under the law of the land in light of its earning power and all other relevant facts.

The courts, including this Court, have consistently upheld the emphasis which the Commission has given to earning power, particularly to prospective earning power, in valuating the debtor's properties and in fixing the limits of permissible capitalizations. Thus, in *Ecker* v. *Western Pacific R.R. Co.* 318 U.S. 448, this Court said that "There is no more important element in the valuation of commercial properties than earnings". In Group of *Institutional Investors* v. *Chicago M. St. P. R.R.*, 318 U.S. 523, this Court stated:

> "It is argued that under this provision earning power is not the primary criterion of value and that the Commission did not give proper weight to original cost, reproduction cost new, or the valuation for rate-making purposes. We disagree. We recently stated in *Consolidated Rock Products Co.* v. *DuBois, supra,* in connection with a reorganization of an industrial company, that the criterion of earning capacity is the essential one if the enterprise is to be freed from the heavy hand of past errors, miscalculations, or disaster, and if the allocation of securities among the various claimants is to be fair and equitable. * * * *
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> In this case the Commission followed the statute. While it made earning power the primary criterion, it did not disregard the other valuations. It considered them and concluded in subsance that they afforded no reasonable basis for believing that the probable earning power of the road was greater than what the Commission had found it to be by the use of other standards. The Commission need not do more."

In its original report on the Rock Island plan, issued October 31, 1940, the Commission found as to prospective earnings:

> "Despite such savings, the evidence of record convinces us that the estimate by the first and refunding committee of $12,500,000 of earnings available for interest in a normal year is somewhat too high. However,

> earnings available for interest and dividends of approximately $11,000,000 in a prospective normal year are reasonably well supported by the evidence of record, and particularly by the analytical traffic study presented by the first and refunding committee and the estimates of revenues and expenses based on such study.

The "analytical traffic study" referred to by the Commission was made in 1938 and was presented at a hearing on July 20 of that year. The estimates of prospective earnings ran through the year 1942. (242 ICC 298.)

In its supplemental report of January 3, 1944, the Commission did not make any other estimate of future "normal" earnings. It found merely:

> "While the record shows that the current earnings of the debtor are greatly in excess of the estimated 'normal' income of the reorganization company, we do not believe that the economic conditions which made them possible are of such a permanent character as to warrant increasing the total capitalization heretofore approved." (257 ICC 265, 286)

This is the language cited by the Circuit Court of Appeals in support of its assertion in this case that the Commission did in fact forsee and consider the earnings which the Rock Island subsequently has realized.

In its report of May 1, 1944, in which it certified the present plan of reorganization, the Commission merely referred to its previous report of January 3, 1944, as to the current earnings and reaffirmed its conclusions therein stated.

Obviously, in its orders of 1944 the Commission was referred only to the "current earnings", i.e., wartime earnings, which it concluded were caused by economic conditions of such non-permanent character as not to warrant an increase in the total capitalization theretofore approved.

The Circuit Court of Appeals, after quoting these provisions from the 1944 reports of the Commission, concluded that "to us these quotations from the reports of the Commission, whose judgment we are obliged to respect, show the acumen of that body in the consideration of possible economic changes and they put to flight any flimsy contention of the development of unforseen conditions". (Slip opinion, pages 10, 11.)

There is absolutely nothing in this record to show that the Commission ever considered what the post-war earnings of the Rock Island might be or even considered any evidence of prospective earnings, other than that put into this record over nine years ago (July 20, 1938) consisting of estimates of prospective earnings through 1942.

On the contrary, there is explicit evidence that the Commission did not even attempt to envisage or consider, when it certified the present plan in 1944, what the prospective earnings of the Rock Island would be after the termination of the economic conditions occasioned by the war and the arrival of post-war conditions of a "permanent character" which would require an increase in permissible capitalization if materially in excess of the estimated "normal" annual earnings of $11,000,000.

On October 12, 1943, Commissioner Splawn, who was Chairman of the Legislative Committee of the Commission, testified before a subcommittee of the Committee on the Judiciary of the House of Representatives:

> "Of course, we cannot forsee, I think, just what is going to be the situation after the war. If the more optimistic views turn out to be correct, they will have much traffic for a long time and perhaps increase in traffic over a number of years; that is, increase over pre-war traffic. If so, the same situation would obtain for any company not reorganized in the meantime that would obtain now for those reorganizations which are not completed.

"I will not undertake a prophecy as to what will happen after the war. I think it may be different from anything we ever had, because this is a different kind of war from anything we have ever had. How many lives will be spent, how many bodies will be broken, how much of capital will be destroyed, is yet unanswered. No one can possibly foretell or foresee to what extent devastation and destruction may be kept from our land. To what extent new inventions may bring it to us any month, we too cannot forsee. The power of pre-war commercial nations to trade, produce after the war, we cannot yet determine.

"We will probably have many new and difficult problems. If we get out of this war, as we have reason to expect, with most of our capital intact, that is, the forms of capital which are fixed, our buildings and plants, transportation will certainly be a tremendously improved industry, and with the new inventions that may follow, if we do not lose too many of the potential and prospective inventors, may bring on that period of industrial development which we seemed to be approaching when this unhappy conflict was precipitated.

"But, I do not see that it is necessary to answer unanswerable questions when a reorganization is up and the evidence is in."

It is plain from the Commissioner's testimony not only that he would not undertake a prophecy as to prospective post-war earnings, but that he considered it wholly unnecessary "to answer unanswerable questions when a reorganization is up and the evidence is in". It would appear, therefore, that the Commissioner was of the view that, inasmuch as the records of the hearings in these reorganization cases had been closed and all the evidence was in, the Commission had no responsibility or duty to modify, or even to consider the modification of, its previous estimates of future earnings based on the records made years before.

And yet within less than three months following the date of this testimony the Commission issued its report of January 3, 1944, upon which the Circuit Court of Appeals bases its conclusion that the Commission actually foresaw and gave consideration to the subsequent post-war earnings which the Rock Island has experienced. These earnings available for interest (before Federal income taxes) amounted to more than $20,000,000 in 1946. They already equal this figure in the first nine months of 1947, and are presently running at a rate which will produce $28,000,000 or more for the full year, as compared with the Commission's ancient estimate of $11,000,000 [2]—more than 2½ times the foundation figure of the plan. Is this not a substantial change evidencing the obsolescence of the Commission's estimate and constituting "unanticipated large earnings" within the meaning of the *Rio Grande* decision cited by Mr. Justice Rutledge as controlling? (328 U.S. 495.)

While the Commission was wholly silent in its 1944 reports as to what it considered the prospective post-war earnings of the Rock Island might be, the 53rd Annual Report of the Commission to Congress submitted in November, 1939, discloses the attitude of the Commission approximately at the time it formulated the original Rock Island plan. In that report the Commission said:

> "We know from past experience that the upswing in business which war brings is temporary and likely to be followed by an aftermath in which conditions are worse than before." (p. 5)

It was apparently in this spirit (now proved to be utterly unfounded) that the Commission in 1944 adhered to its 1940 estimate of prospective normal earnings of only

[2] Federal income taxes are based on income remaining after deduction of interest accruals. The Trustees' report for the first nine months of 1947 shows $20,202,756 earned for interest (before estimated allowance for Federal income taxes). Federal income taxes amounted to $3,721,188 in 1946, and are estimated at $4,182,000 for the first nine months of 1947 and somewhat over $6,000,000 for the full year.

$11,000,000, which estimate was in turn based upon testimony put into the record in 1938. The shocking disparity between this estimate and the present and prospective peacetime earning power of the Rock Island system, as demonstrated by its annual post-war operations, is in itself a sufficient ground for this Court to affirm the order of the District Court remanding the plan to the Commission. This would be true even though it appeared that the Commission had in fact "envisaged and considered" the post-war earnings of the Road at the time the present plan was finally formulated and certified on May 1, 1944. It is more certainly true in view of the fact that the record discloses that the Commission did not even attempt to forsee the post-war conditions or to consider that factor in the formulation of its plan.

The Commission, in its supplemental report of January 3, 1944, made substantial changes in the plan by reason of the fact that some $38,000,000 was then available for distribution to creditors out of the approximately $82,000,000 of cash and cash equivalents then on hand. Actually, about $34,000,000 was subsequently distributed by order of the court, in accordance with the Commission's report, for retirement of certain obligations and the payment of interest. Even after this distribution and the expenditure of other large amounts for debt reduction (including more than $20,000,000 paid to the R.F.C.), capital improvements, etc., the Trustees have accumulated out of earnings over $92,600,000 in cash and cash equivalents as of October 31, 1947. At least $50,000,000 of this amount is now available for further debt retirements, which would equitably entail further adjustments in the allocation and distribution of securities. As stated below, the necessity for similar adjustments in the Missouri Pacific plan was one of the reasons why the Commission recommended the return of that plan for reconsideration.

That such an additional accumulation of cash, available for distribution, was not in fact "envisaged or considered" by the Commission when it issued its report of May 1, 1944, certifying the plan, is clearly shown by the following statement in that report:

> "While it cannot be said positively that cash distributions in addition to those provided for in the plan could not be made prior to the consummation of the plan, in our opinion, the provisions of Article XVII will not result in any injustice to the interested parties."

Article XVII provides in effect that any new securities, undistributed by reason of the payment or reduction of claims before the plan is consummated, shall be retained *in the treasury* of the new reorganized company. The paradoxical effect of this would be to prevent the present debtor or junior security holders from receiving any benefit from the payment of debt. The better off the road is, the smaller its permissible capitalization! This is indeed a rubber rule, an elastic yardstick of the public interest. However much the debtor paid on account of its debts, the released securities would be retained in the treasury of the new company, and this "corpus", with its liabilities getting smaller and smaller and its assets richer and richer, would pass exclusively to the remaining security holders! Reduced to absurdity, such a doctrine implies that the claims of all but a fraction of the creditors could be paid in full out of the accumulating cash of an estate, and such fractional creditors would then receive the whole estate, to the exclusion of the debtor and other creditors whose interests had been forfeited by the plan.

Surely, the Commission did not foresee and consider that any amount like $50,000,000 would now be available for distribution to the interested parties, over and above working capital requirements and after the payment of heavy income taxes. It could not have meant to assert that the non-allocation of the benefits of distributing any such

amount would "not result in any injustice to the interested parties". That the Commission regarded even a moderate accumulation of cash for such purpose as a rather remote possibility, is demonstrated by the words, *"it cannot be said positively* that cash distributions in addition to those provided for in the plan *could not be made* prior to the consummation of the plan". (Italics ours.) This is not the language of anticipation, or even reasonable surmise. It is rather an express judgment of improbability. Certainly, it cannot fall within the meaning of the doctrine enunciated by this Court as to things "envisaged and considered" by the Commission.

In the brief filed by the Commission with the Circuit Court of Appeals for the Eighth Circuit in the Missouri Pacific case (*Wright et al.* v. *Group of Institutional Investors et al.*), the Commission recommended to the Court that the plan of reorganization "be referred back to it for further hearing and consideration and such revision as it may find to be appropriate". (A copy of the Commission's brief is attached as Appendix "B" to the "Reply Brief of Debtor-Petitioner" in cases numbered 184-189, pages 16-23.)

That there were many other changes in conditions affecting the Rock Island, of a character not "envisaged and considered" by the Commission in the formulation of this plan, is shown under Point IV, pages 9 to 18, of the Reply Brief filed by these petitioners in support of their petition for a writ of certiorari. These changes are very clearly analogous to those described in the Commission's brief filed in the Missouri Pacific case. All of them have occurred subsequently to January 1, 1944, the effective date of the plan, and subsequently to May 1, 1944, the date of the last order of the Commission certifying the plan.

These changes involve, among other things:

1. The payment of obligations and the consequent release of securities previously allocated.
2. Payments on account of accrued interest.
3. Extensive expenditures for improvements.
4. Large accumulations of cash from earnings.
5. Altered circumstances in the selection of Reorganization Managers.

In its brief to the Eighth Circuit Court of Appeals, the Commission says it did not foresee or consider such changes in the Missouri Pacific case when it entered its final order and certified that plan on October 9, 1944. Is it reasonable to suppose (as the Seventh Circuit Court of Appeals in the instant case apparently did), that the Commission did in fact foresee and consider on May 1, 1944, almost exactly the same kind of changes in the Rock Island case as those it did *not* foresee five months later in the Missouri Pacific case?

It is expressly stated in the Commission's brief that it was filed in response to an order of the Circuit Court requesting the Commission's views on the issues presented. The Commission further stated therein that it "has consistently refrained from volunteering its views on new or changed conditions". This statement of the Commission's policy is in accord with that expressed in the response of the Director of the Commission's Bureau of Finance to counsel for the Convertible Bondholders' Group wherein the Director stated that it was not the Commission's practice to recommend to the Court that it return a plan of reorganization for reconsideration and possible revision by the Commission *without a specific request from the Court* for the Commission's views. (Reply Memorandum Brief of Counsel for the Convertible Bondholders' Group in cases numbered 190-193, page 2.)

In view of this declared policy, the letter from the Chairman of the Commission to the Chief Justice, dated October 9, 1947, and discussed in the opinion by Mr. Justice Rutledge, takes on special significance. For although, as Mr. Justice Rutledge points out, "the letter's only positive assertion bearing upon the merits of our disposition is the statement: 'Since the plan was sent to the district court by the Commission, there have been material changes in the situation as it affects the condition of the debtor' ", the inference is inescapable that the changes referred to by the Commission were of a kind not "envisaged and considered" by the Commission in its formulation of the plan certified May 1, 1944, now pending before this Court. Why would the Commission so advise this Court if the "material changes in the situation as it affects the condition of the debtor" were merely changes that the Commission had foreseen and considered in its formulation of the plan in 1944?

Mr. Justice Rutledge summarizes Chairman Aitchison's letter as follows:

> "This letter comes down therefore to a statement that there have been material changes in the debtor's condition since the Commission's approval was given, and to the statement that if the Court finally should remand the case to it the Commission is prepared to do its duty by affording a further full hearing and rendering a further report. In addition the possible though by no means certain inference might be drawn that the Commission may desire another opportunity to consider the plan before it goes to confirmation."

We fully agree with the criticisms elsewhere contained in the opinion as to the form and inadequacy of the Commission's presentation in the letter of its Chairman. But it is respectfully submitted that the pending petitions for writs of certiorari should not be denied for lack of a proper and full expression of the views of the Commission, merely

because of an issue of procedure which readily could be avoided by the entry of an order suggesting that the Commission file a brief herein. The interests of investors in rail securities and of the public in general would seem to require that a readily soluble problem of procedure (as to whether the Commission should volunteer its views or the court invite them) should not stand in the way of an expressly informed decision on the merits of this important controversy. A delay of a week or two, within which time the Commission could file a full brief of its views, is most certainly of trivial consequence, especially in view of the fact that should the pending plan be consummated, more than 60% of the claims of the $32,000,000 principal of Convertible Bonds (the issuance of which was approved by the Commission but a few short years before bankruptcy), as well as all of the stock of this carrier, would be completely eliminated. Before such a drastic consequence of the exercise of governmental powers is given sanction by this Court, it would seem that appropriate co-operation between the Court and the Commission should be effected, so that such a decision may be supported on known facts (to be reported by the Commission), rather than upon this Court's assumption or speculation as to what the Commission really did "envisage and consider" in the formulation of this plan.

The Commission's brief filed in the Missouri Pacific case was expressly directed to the "chief issue" of "whether the conditions of the bankrupt's property have so changed since the closing of the record before the Commission and the certification of the plan to the District Court as to make it necessary or desirable to have further Commission consideration". The filing of a brief by the Commission on the same general issue in the Rock Island case should be suggested by this Court, in the event the Court is of the opinion that, upon the record as it now stands, the order of the District Court remanding the plan to the Commission should not be affirmed.

Wherefore, petitioners respectfully pray for a rehearing of petitioners' Petition for Writ of Certiorari and move the entry of an order by this Honorable Court suggesting that the Interstate Commerce Commission file with the Court a brief of the Commission's views as to the relevant changes which have occurred since the closing of the record before the Commission and the certification of the plan on May 1, 1944, as to whether such changes were envisaged and considered by the Commission in the formulation of the plan as certified, and as to whether the Commission is of the present opinion that the pending plan should be returned to it for reconsideration and possible revision in the light of such changes and all other relevant facts.

Respectfully submitted,

CARTER H. HARRISON, JR., et al., as the Protective Committee for The Chicago Rock Island and Pacific Railway Company 7% and 6% Preferred Stock

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CERTIFICATE OF COUNSEL.

I, LOY N. McINTOSH, counsel herein for the above named petitioner, do hereby certify, pursuant to Rule 33, that the foregoing Petition for Rehearing is presented in good faith and not for delay.

LOY N. McINTOSH

November 14, 1947